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No. 86-6637

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PAUL G. GORMAN

PETITONER

v.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Paul G. Gorman
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419-867-0860

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in Federal Prosecutions under 18 U.S.C. Sections 201 (f) and (g), the "Gratuity" Subsections of the Federal Bribery Statute, the Rulings in United States v. Evans, 572 F.2d 455 (5th Cir.), cert. denied, 439 U.S. 870 (1978) and United States v. Williams, 705 F.2d 603, (2d Cir.), cert. denied, 464 U.S. 1007 (1983), Permit the Government to Sufficiently Prove the Element of "Anything of Value", in the Absence of Evidence of the Public Official Requesting or Receiving a Gratuity?

2. Whether, in Federal Prosecutions Under 18 U.S.C. Sections 201(f) and (g), a Violation Can Be Sufficiently Proven in the Absence of Evidence That the "Thing of Value", Was Requested or Received "For or Because of an Official Act?"

3. Whether, in Federal Prosecutions under 18 U.S.C. Sections 201 (f) and (g), the "Gratuity" Subsections of the Federal Bribery Statute, the Element of "Intent" can be Sufficiently Proven in the Absence of Evidence of the Public Official Requesting or Receiving a Gratuity?

4. Whether, in Federal Prosectutions Under 18 U.S.C. Section 201(g), This Court's Ruling in Stirone v. United States, 361 U.S. 212 (1960), Prohibits the Government From Proving That Part of a "Gratuity" Came From the Person Named in the Indictment, and Proving That Part of the Gratuity" Came From an Person not Named in the Indictment, When the Grand Jury Charged All of the Gratuity to

Have Come From the Person Named in the Indictment?

5. Whether, in Federal Prosecutions, Under 18 U.S.C. Section 208, This Court's Ruling in Stirone v. United States, 361 U.S. 212 (1960) Prohibits the Government From Proving a Violation of 18 U.S.C. Section 201(g), the Federal Gratuity Statute, Which Was Charged in the Indictment, by Proving a Violation of 18 U.S.C. 201(c), the Federal "Bribery" Statute, Which Was Not Charged in the Indictment?

6. Whether, in Federal Prosectutions, Under 18 U.S.C. Section 208, the Element of "Negotiation" Can be Proven Through Conversations in Which the Government Witness Testifies That She and the Public Official Were Discussing "Potential" Employment?

7. Whether, in Federal Prosectutions Under 18 U.S.C. Section 208, this Court's Decision in Stirone v. United States, 361 U.S. 212 (1960), Prohibits the Government From Proving "Negotiation" With a Prospective Employer, Named in the Indictment, Through a Conversation With an Associate of the Prospective Employer, Not Named in the Indictment?

8. Whether, in Federal Prosectutions Under 18 U.S.C. Section 208, the element of "Official Proceedings" Can be Sufficiently Proven, When, in a Multi-Subject Criminal Investigation, the Subject in Which the Potential Employer is

Found to Have a "Financial Interest" is Terminated as a Subject of the Investigation, Prior to Evidence of "Negotiation" With the Potential Employer?

9. Whether, in Federal Prosecutions Under 18 U.S.C. Section 208, a Potential Employer May Be Sufficiently Proven to Have a "Real" as Opposed to "Spectulative" "Financial Interest" in a Criminal Investigation, When the Prospective Employer Has No Nexus to the Subjects of a Criminal Investigation, But Merely Has an "Interest", Meaning "Concern" in the Proceedings of the Official?

10. Whether, in Federal Prosecutions Under 18 U.S.C. Section 208, the Element of "Knowledge" Can Be Sufficiently Proven When the Proofs at Trial Prove That the Public Official had Knowledge of a Potential Employer's "Concern" With his Criminal Investigation, But in the Absence of Evidence That the Official had knowledge of the "Financial Interest", Proven at Trial?

11. Whether, in Criminal Prosecutions, Involving Chains of Circumstantial Evidence, Introduced to Prove an Element of the Crime, the Burden of Proof Imposed Upon the Government to Prove One or More of the Links in the Chain of Evidence is Less Than the Historical Burden of "Beyond a Reasonable Doubt", and, Is, Instead, Merely the Burden of Proving That the Evidence Did Only "Strongly Indicate" Guilt?

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PETITION FOR WRIT OF CERTIORARI
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The petitioner, Paul G. Gorman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on December 23, 1986.

JURISDICTION

The Sixth Circuit Court of Appeals

entered its Memorandum decision, affirming the denial of Petitioner's motion for acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure at his criminal trial, on December 23, 1986. A copy of the memorandum is attached as Appendix A.

The Circuit denied Petitioner's petition for rehearing and rehearing in banc, on February 6, 1987. A copy of the order is attached as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner was convicted of one count of violating 18 U.S.C. Section 201(g) and one count of violating 18 U.S.C. Section 208. The relevant provisions of those statutes are attached as Appendix C.

Petitioner raises constitutional

arguments based upon the Fifth Amendment to the Constitution of the United States. A copy of the text of Amendment V is attached as Appendix D.

STATEMENT

Petitioner, as a Department of Justice prosecutor, was a public official. He returned to his home, Toledo, Ohio, in 1980, through the Economic Crime Enforcement Program. In June of 1982, he applied for appointment as an Assistant United States Attorney in the Toledo Office. On September 20, 1982, that appointment was made.

In April, 1982, he was assigned to prosecute two persons for kiting checks, James Hartley and Larry Miller, former President of the McComb Bank, which Hartley had used in the kite. They offered to plead guilty. Hartley had filed for bankruptcy in September of 1981.

In August of 1982, the Trustee in Bankruptcy, responsible for Hartley's case, combined with his law clerk, Christine DeSanctis, and a representative of the Hartley business creditors, Merle Weber, to initiate a federal criminal investigation and prosectution of the banks, not including the McComb Bank, which Hartley had utilized in the check kite, Weber's fee based on recovery. Weber dominated, according to testimoney of DeSanctis. The Trustee did not testify.

Their scheme was to make greatly inflated claims against the Carey Bank and the St. Joseph Bank, the other banks Hartley had used in the kite, alleging they had evidence that those banks had participated in the Hartley check kite.

The theory they displayed was that, Hartley was detected in his criminal activities, and, several months later, he

filed for bankruptcy, whereupon, his creditors, (Weber's principals) lost money. From those facts they presented a claim to the banks, other than the McComb Bank, that Hartley's criminal acts had "caused" the bankruptcy which "damaged" the creditors.

The basis of their claim to the banks was that they possessed "evidence" that the banks had participated in the check kite with Hartley. Following their claim that the criminal acts had "caused" the bankruptcy, they claimed that, because the banks "participated" in the criminal acts with Hartley, that the banks should pay for the losses of the creditors. 1/

1/ The FBI investigated the matter from April of 1981 through April of 1983. AUSA's Foley and Gorman and the federal grand jury, specifically, investigated whether anyone beside Miller and Hartley had any participation in or knowledge of the check kite. No such evidence was found. AUSA Foley testified that,

DeSanctis testified that there was no nexus whatsoever between the bankruptcy and the criminal acts of Hartley, and that the banks had no duty, legal or otherwise, to pay the claims which she and Weber made on the banks, on behalf of the creditors. The claims were only part of a scheme to get the banks to pay money to the creditors, from which they would all share. They <u>believed</u> that, if they could convince the banks that they had evidence, from Hartley's business records, of criminal

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following presentation of all evidence, including all interviews of Hartley, no evidence was discovered to indicate that any person, beside Hartley and Miller was involved, and that no evidence of Hartley's bankruptcy being irregular. Petitioner's investigation never included an investigation of his bankruptcy. Hartley and Miller pled guilty only to charges relating to the check kite and no further investigation of Hartley was accomplished nor were any further charges ever brought against him.

participation on the part of the banks, the banks would then pay their unsupported claims, rather than be exposed as criminals. No bank accepted their claims, either as evidence of the banks' participation of the banks' having any duty to pay the creditors.

Weber then theorized that pressure of a federal criminal investigation might cause the reluctant banks to pay their claims because, according to Weber's logic, the banks could then point to such payment as "retribution" for "crimes" the banks had "committed upon the creditors" when the federal authorities found their "criminal acts." According to Weber's statements to DeSanctis, the banks would pay the false claims because they would conclude that the federal government and the Courts would be more "lenient" with the banks, because of such payment. There was no

evidence Weber or DeSanctis ever presented this "logic" to any of the banks. There was evidence that DeSanctis and Weber believed it.

Trial testimony clearly established that no bank ever took the claims of Weber and DeSanctis seriously, and no bank ever paid the creditors of Hartley. 2/

Using an association the Trustee had with AUSA Foley, Petitioner's superior, the three presented voluminous records and alleged that the records displayed the

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2/ Trial testimony established that Weber had a ten-year history of filing civil suits against banks which he perceived to have wronged him. He would then go to government prosecutors and allege that the banks had committed criminal acts, related to the civil complaint. He would then cite the criminal investigation, which he had intitiated, to the banks, as leverage for settlement in the civil suit, rationalizing that the banks had better settle because their evil deeds were soon to be discovered in the criminal investigation.

possibility of the banks' participation. Petitioner conducted a limited investigation, including grand jury, to determine if such evidence existed. One grand jury session was utilized in September, November, 1982 and January, 1983. Testimony confirmed that, by January 17, 1983, Petitioner advised AUSA Foley that no evidence existed of participation

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When the prosecutors found no evidence of wrongdoing Weber would then attack them, publicly, alleging criminal wrongdoing by the same prosecutors for failing to indict those whom Weber had alleged wrongdoing. At different times Weber had made such attacks against the Medina, County (Ohio) Prosecutor, and the Summit County (Ohio) Prosecutor. He brought charges of criminal malfeasance against every member of the Medina County grand jury, when they refused to indict those who Weber charged. Weber was particularly hostile to William Petro, then U.S. Attorney for the Northern District of Ohio, and Petitioner's superior, who in private practice, had defended a reporter who Weber sued for being in a "conflict of interest" when he would not print an article critical of those whom Weber was then suing, because Petro had referred to Weber as a "whacko".

or knowledge by anyone associated with the banks, and he terminated the investigation of the banks. Foley concurred.

Miller had pled guilty months previously and had been sentenced without delay. Hartley was permitted to plead guilty, on January 17, 1983, following the investigation of the banks, and was sentenced in April, 1983

Beginning in August of 1982, Weber and DeSanctis engaged Petitioner socialy. Weber came to his home on several occasions. Weber determined that Petitioner had approximately $25,000 remaining in contractor's bills on his new home, which he had just completed. DeSanctis suggested that Weber loan Petitioner the money so, in her words, "then we will own him." She testified that Weber, in a social context, volunteered the loan to Petitioner with no

connection to his official position or duties. When he accepted, Weber, according to trial testimony of DeSanctis, returned to her and stated that, "Now we have Gorman where we want him, I have loaned him some money."

The loan from Weber was evidenced by a properly executed promissory note, displaying appropriate information, including an appropriate interest rate.

However, in January of 1983, between the time he received the loan, and the time he repaid Weber, Petitioner terminated the investigation of the banks. Weber confirmed this termination at the February 12, 1983 breakfast he had with Petitioner, whereupon he obtained a document from Petitioner, upon which Petitioner wrote a salary and other conditions which would make him leave his government position. He then took the

document to DeSanctis and stated, according to her, "Now I can keep Gorman where I want him, with the Justice Department."

In May, 1983, when the loan was repaid, Weber wrote Senator Proxmire and the Justice Department, alleging all the evil and "unsavory tactics" referenced by Judge Harvey. (App. A, infra, p. A3) He claimed that Petitioner had extorted the loan from him and that Petitioner had been in a "conflict of interest", as "evidenced" by the February 12, 1983 document.

The indictment reflected the loan, as to the gratuity count and the February 12, 1983 meeting and document, as to the conflict count.

The FBI case agent testified that all evidence they had came from Weber.

REASONS FOR GRANTING THE WRIT

1. A violation of 18 U.S.C. Section 201(g) cannot be sufficiently proved in the absence of the public official requesting or receiving "additional compensation" to his or her official salary, for or because of an official act.

2. A violation cannot be proven in the absence of evidence that the gratuity was "for or because of an official act.

This decision is in conflict with established case law in other Circuits in that it lowers the minimum prosecutable standards of criminal conduct under the federal gratuity statute, by including, as criminal acts, non-gratuitous purchases and other, valid, value-for-value exchanges, as illegal "things of value", for which public officials may be prosecuted under 18 U.S.C. Section 201(g) and under which sellers of items and services may be prosecuted under Section 201(f), the federal gratuity subsections.

In order to prove the "thing of value" element, according to precedent

established in other Circuits since 1965, the government had to prove that a public official had requested or received "additional compensation" to his or her official salary, in the forms of gifts or gratuities, for official acts, for which the government was already paying. United States v. Irwin, 354 F.2d 192, 196-7 (2d Cir. 1965); United States v. Umans, 368 F.2d 725, 728 (2d Cir. 1966); United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1966); United States v. Niederberger, 580 F.2d 63 (3rd Cir.), cert. denied, 439 U.S. 980 (1978); United States v. Evans, 572 F.2d 455, 480, 481 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Hare, 618 F.2d 1085, 1087-88 (4th Cir. 1980)

Howewer, the Sixth Circuit ruled in this case that the government proved the "thing of value" element because, (1)

Petitioner requested or received the "things", charged in the indictment, and, (2) he perceived the "things", requested or received, to have "value". These proofs, according to the Panel, were alone sufficient to prove the element of "anything of value" under Subsection (g), even where the official, paid for the "things", and in the absence of any additional compensation requested or received by the official. (App. A. infra, p. A9-10)

In the instant case, the indictment charged Petitioner with requesting or receiving, "things of value from Merle C. Weber" under 18 U.S.C. Section 201(g), that is, "loans totaling $23,000 and future employment at an annual salary of $150,000."

While the Circuit described Petitioner's argument, regarding the

"future employment" to be that "the loan and promises of future employment were not 'things of value'" (App. A, infra, p. A9) his argument, actually was, that that there was "no evidence" of a promise or offer of "future employment".

The arguments offered in this Petition, relating to the loan, also are intended to be offered as to the "future employment", also charged as a gratuity.

The government proved that Petitioner had not requested but had agreed to receive and received a valid loan from Weber in that amount of $13,000. He had, also, at Weber's urging, applied for and received a $10,000 loan from the McComb Bank, which was not a subject of his investigation, and which was not one of the creditors of Hartley, represented by Weber. Miller, the former bank President, had been convicted and sentenced months

before Petitioner applied for the loan at the bank and no one else at the bank was involved. There was no conflict in the application and the government provided no evidence that such application violated any Department of Justice Rules or guidelines. Both loans were repaid, with appropriate interest, prior to the transactions being questioned.

In essense, Petitioner purchased services from an individual and a commercial lending institution, for which he fully paid regular and customary rates.

The government then prosecuted him, using the prohibitions of the federal gratuity statute, proving only that he had requested or received the "things" charged in the indictment, which he perceived to have value. No evidence was produced to indicate, in any way, that the "things" charged in the indictment were offered,

transferred, requested or received because of an of Petitioner's official duties.

Nor was evidence produced that the "things", listed in the indictment, reflected a offer, transfer, request or receipt of any "additional compensation" through a gift or gratuity.

Prior to the existence of the acts charged in the indictment, Petitioner, like every other public official, was instructed by the Courts as to the purpose of the federal gratuity statute and what would constitute a violation under 201(g).

In the Second Circuit

It is apparent from the subsection that what CONGRESS HAD IN MIND WAS TO PROHIBIT AN INDIVIDUAL, DEALING WITH A GOVERNMENT EMPLOYEE IN THE COURSE OF HIS OFFICIAL DUTIES FROM GIVING THE EMPLOYEE ADDITIONAL COMPENSATION or a TIP or GRATUITY for or because of an official act already done or about to be done. United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965) (Emphasis Added)

In addition, subsection (f) REQUIRES THAT THE GOVERNMENT, TO CONVICT AN ACCUSED,

MUST PROVE that the purpose which he had in mind in making or promising to make a GIFT was to give ADDITIONAL COMPENSATION OR A REWARD, GRATUITY OR SIMILAR FAVOR, by reason of some "official act performed or to be performed." United States v. Irwin, supra, at 197.

In the D.C. Cirtuit
and
In the Second Circuit

The GRATUITY SECTIONS, (f) and (g) dealing with the payment and receipt of a GRATUITY, respectively, were PRIMARILY DESIGNATED TO TAKE CARE OF THE CASE WHERE THE ILLEGAL PAYER OFFERS A PUBLIC OFFICIAL A GIFT FOR DOING WHAT THE PUBLIC OFFICIAL IS PAID TO DO ANYWAY. Both the giving and receiving of GIFTS for doing the act are thus forbidden...[T]HE SECTION MAKES IT CRIMINAL TO PAY AN OFFICIAL A SUM WHICH HE IS NOT ENTITLED TO RECEIVE regardless of the intent of either payor or payee with respect to the payment. United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974), citing, United States v. Umans, 368 F.2d 725, 728 (2d Cir. 1966) (Emphsis Added)

Petitioner's argument on appeal was not that he thought the "things", charged in the indictment to be valueless. He argued that an official can purchase an item or service, which the official perceives to have "value", and at the same time, not

request or receive a "thing of value", as intended by Congress, because that element was intended by Congress to mean items or services which an official would request or receive gratuitously, thereby providing him with "additional compensation" which Congress intended to prohibit. United States v. Iwrin, United States v. Umans, United States v. Evans, supra.

All public officials and all corporations and individuals who may sell or otherwise engage in economic exchanges with public officials, now have two conflicting instructions as to what will constitute a violation under Sections (f) and (g).

In the Sixth Circuit any valid purchase, rental, lease, or other valid economic exchange is a potential criminal violation under Section 201(g) if the official perceived the item or service to

have "value". Likewise, any valid sale, lease, or rental of an item or service by a corporation or citizen dealing with a public official, is a potential criminal violation under Section 201(f)

In the other Circuits cited, a public official would only be in violation of Section 201(g) if the official requested or received "additional compensation" to his or her official salary through "gifts" and "gratuities". Likewise, in the other Circuits, individuals or corporations dealing with public officials, would only be in violation of Section 201(f) is they offered or provided such "additional compensation" to the official's salary through "gifts" and "gratuities." Valid purchases and sales would not be potential crimes under subsections (f) and (g).

Of critical importance to this Petition is the Fifth Circuit decision in United

States v. Evans, 572 F.2d 455 (5th Cir.), cert. denied, 439 U.S. 870 (1978).

The Fifth Circuit, in Evans, supra, could not have been clearer in ruling, with all of the other Circuits which have considered the issue of what Congress intended to constitute a violation of Section 201(g). That Circuit stated, specifically, that it is the additional compensation paid to officials for acts, which the government is already paying that constitutes the violation under Section 201(g). Supra, at 480.

> The GRAVAMEN OF EACH OFFENSE (18 U.S.C. Sections 203(a) and 201(g)), is not an attempt to be corrupted or influenced but SIMPLY THE ACCEPTANCE OF UNAUTHORIZED COMPENSATION. United States v. Evans, supra, at 481. (Emphasis Added)

United States v. Evans, supra, is the only precedent cited by the Sixth Circuit, in the instant case to support its interpretation of the purpose of the

statute and, presumably, the intent of Congress. However, the Petitioner is forced to point out that, in comparing Judge Harvey's paraphrase of United States v. Evans, supra, to the actual ruling and intent of the Fifth Circuit in that decision, it is apparent that there exists a significant and material variance between the Sixth Circuit's paraphrase of that case and the obvious wording and intent of the Fifth Circuit.

> The purpose of these statutes is to reach any situation in which the judgment of a government agent might be clouded BECAUSE OF PAYMENTS OR GIFTS made to him by reason of his position otherwise than as provided by law for the proper discharge of official duty. United States v. Evans, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870 (1978) (Emphasis Added)

The following is a quote of the paraphrase of United States v. Evans, supra, stated by Judge Harvey in the Sixth Circuit Opinion of December 23, 1986:

> The purpose of Section 201(g) is to reach ALL SITUATIONS in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position. United States v. Evans, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870 (1978) (App. A, infra, p. A9) (Emphasis Added)

In the precedential paraphrase, the words "because of payments or gifts" were, inadvertently, deleted from the passage of the Fifth Circuit Decision. Unfortunately, the inadvertence, effectively, changed the intended meaning of the Fifth Circuit's legal ruling on Section 201(g), making it appear to comply with the otherwise unprecedented ruling of the Circuit in the instant case.

In ruling that the "gravamen" of the offense is "simply the acceptance of unauthorized compensation", the Fifth Circuit's ruling in Evans, contradicts the ruling of the Sixth Circuit on the same issue.

The Circuit introduced and characterized the statutes and convictions under appeal thusly:

HARVEY, Senior District Judge. Following a jury trial in the United States District Court for the Northern District of Ohio, appellant Paul G. Gorman was convicted on one count of conflict of interest, in violation of 18 U.S.C. (Section) 208, and one count of ASKING FOR OR RECEIVING ILLEGAL GRATUITIES, in violation of 18 U.S.C. (Section) 201(g). (App. A, infra, p. A1) (Emphasis Added)

Contrary to the appellant's argument, there is NO AUTHORITY FOR THE PROPOSITION THAT THE ITEMS RECEIVED MUST BE "GRATUITIES" AS THAT TERM IS COMMONLY UNDERSTOOD. (App. A, infra, p. A9) (Emphasis Added)

The Circuit then ruled that the prohibitions of Section 201(g) apply to public officials, even in cases where they validly purchase items or services.
Gorman argues that the loans he received from Weber were not "things of value" because he repaid them in full with interest. As such, he argues, HE MERELY ENTERED INTO AN ECONOMIC EXCHANGE, RECEIVING SOMETHING FOR WHICH HE PAID A FAIR PRICE. ALTHOUGH THIS ARGUMENT IS LOGICAL, IT IS MERITLESS UNDER SECTION 201(g). (App. A, infra, p. A9) (Emphasis Added).

In order to put the underlying policy of the statute into effect, the term "thing of value" must be broadly construed. Accordingly, the FOCUS of the above term IS TO BE PLACED ON THE VALUE WHICH THE DEFENDANT SUBJECTIVELY ATTACHES TO THE ITEMS RECEIVED. United States v. Williams, 705 F2d 603, 623 (2d Cir.), cert. denied, 464 U.S. 1007 (1983). (App. A, infra, p. A9)

In its consideration as to whether or not to grant the petition, several points of fact and law are before the Court:

First: Judge Harvey ruled that the evidence proved the "anything of value" element, primarily because of Petitioner's "dire financial straits." (App. B, infra, p. B4, B9), his income being "$2,515" and his monthly liabilities "$3,428". The evidence displayed family liabilities, paid out of the family income. Judge Harvey did not consider the plain evidence at trial that Mrs. Gorman was gainfully employed at all times of the Weber loan and that the family income was

greater than the family expenses.

In any event, the test as to what constitutes a "thing of value" under Section 201(g), as interpretted by the other Circuits, was whether or not the official requested or received "additional compensation", as a gift or gratuity. United States v. Irwin, United States v. Umans, supra. Under that test, the financial condition or "need" of an official would be of no consequence. A poor official, in great need, who did not request or receive additional compensation would not be in violation. An affluent official, with no need, who did request or receive additional compensation, would be in violation. Id.

When read in light of prior authority on the issue, the Panel's logic as to the proof of the violation is unsupportable.

Second, Petitioner only had the

decisions of the other Circuits, listed supra, to guide his actions under Section 201(g).

Third: There was nothing to instruct Petitioner or other public officials, in those decisions (Irwin, Umans, Evan) that purchasing an item or service, paying full and fair market value would constitute a violation under Subsection (g).

Fourth: The Second Circuit's decision in United States v. Williams, supra, was reported on April 5, 1983, supra, at 603, several months after Petitioner agreed to receive or received (August, 1982 - February, 1983) the "things of value", for which he was indicted. (App. A, infra, p. A4)

Petitioner could not have depended on the Williams, decision for guidance in his ethical conduct because that decision in

had not yet been reported.

The interpretation the Sixth Circuit has attached to that decision, even if correct, could not, reasonably judge the acts of Petitioner because he could not have known of the Williams decision, at the time of the acts charged. Any such retroactice application of case law would be per se violative of Petitioner's Constitutional rights to due process as being ex post facto. Fifth: A reading of the Second Circuit's decision in United States v. Williams, supra, displays that the Second Circuit did not construe the intent of Congress to be at all consistent with the manner in which the Sixth Circuit has applied the decision in the instant appeal.

The Second Circuit, in its earlier decisions in United States v. Irwin, and United States v. Umans, supra, presented

the bedrock interpretation of Congressional Intent, regarding Section 201(g), upon which the other cases followed. That Circuit's decision in United States v. Williams, supra, did nothing to overrule, qualify or otherwise modify its earlier decisions in United States v. Irwin, and United States v. Umans, supra,

The Second Circuit, in United States v. Williams, supra, complimented its earlier decisions, with the common sense ruling that an item or service does not have to have actual, objective value to be a "thing of value" under either Section 201(c), the federal bribery statute, or Section 201(g), the federal gratuity statute. The Second Circuit only ruled that the stock certificates, which former Senator Williams took as bribes and grautuities may have been valueless, but

still fell within the intent of Congress. Proof that the official believed or perceived the item or service to have value, sufficiently proved that the "thing" had value to sustain a conviction under Sections 201(c) or (g). United States v. Williams, supra.

The "focus" of that case was not on the word "value" but upon the statutes which were, according to the Second Circuit, specifically intended to prohibit "gain". supra, at 623. The Circuit did not even hint that a public official would be in violation for requesting or receiving something that had "value", through a valid purchase.

It is, respectfully, submitted that if the Second Circuit, in United States v. Williams, supra, would have intended to modify or overrule its earlier decisions in United States v. Irwin, and United

States v. Umans, supra, it is reasonable to conclude that the Circuit would have done so in unambiguous terms.

The penalties for a public official making a mistake, as to what constitutes a crime under Subsection (g), or for any person dealing with a public official making a mistake, as to what constitutes a crime under Subsection (f), are far too great to permit the least ambiguity in the Circuits' interpretation of the intent of Congress under these subsections.

If the Circuit is wrong, and the government has applied the penalties of Section 201(g) in error, the precedent, established by this case has the immediate potential to be applied, in error, upon other valid purchases and sales between any other public official and any vendor to a public official of goods or services.

It is, respectfully, submitted that

such error must be corrected to give the Department of Justice guidelines in future prosecutions and to protect public officials and the vendors.

If the Sixth Circuit is correct, the conflict in the Circuits still exists, as does the same danger for other public officials and vendors to make a valid sale and purchase, thinking that Section 201(f) and (g) only prohibit the giving and receiving of gifts and gratuities.

In both instances, intervention by this Court, it is, respectfully, submitted, is required.

3. The Gratuity Count - Intent Issue

Intent, under Section 201(g) cannot be proven in the absence of evidence that the public official intended to request or receive additional compensation to his official salary, through gifts and gratuities.

This decision conflicts with other Circuits which have considered the issue

as to what proof is required to sufficiently prove the element of "intent" in federal prosectutions under 18 U.S.C. Section 201(g).

General criminal intent, that is, the state of mind with which an act is done, is an "essential element" of 18 U.S.C. Section 201(g), which the government must sufficiently prove to sustain a conviction under the statute. United States v. Irwin, supra, at. 197.

In it's December 23, 1986 Opinion, the Circuit acknowledged that the Petitioner raised on appeal the issue of intent, under the gratuity count. (App. A, infra, p. A9) However, the Circuit, did not rule on the issue.

The Circuit ruled on the "thing of value" issue on pages 9 and 10 of the Opinion, ruling that both the loans and the "future employment" were sufficiently

proven because the government proved that the Petitioner perceived them to have "value". (App. A, infra, p. A9-10).

Then the Circuit ruled on the issue of the element of Section 201(g), relating to the "official act performed or to be performed by him," on Page 10. (App. A, infra, p. A10).

The Circuit concluded its Opinion, by ruling, on the balance of Page 10 and all of page 11, on the issues of prejudicial variance. (App. A, infra, p. A10-11).

No where does the Circuit's Opinion rule upon or even speak to the Petitioner's issue of "intent", beyond the mere acknowledgement, on page 9, that it was an issue, before that Court. (App. A, infra, p. A9)

United States v. Evans, and United States v. Irwin, supra, both held that the "thing of value", in a 201(g)

prosectuition, referred to "additional compensation" in the form of gifts. Both Circuits then expressed extreme caution in that the element of intent is crucial in a 201(g) prosectution, to protect a public official from being convicted because of "accident, misunderstanding, inadvertance or other innocent reason." United States v. Irwin, at 197. United States v. Evans, supra.

When an official pays for an item or service, that official is displaying the intent not to request or receive the item or service as a "gratuity". Payment is the best evidence of a non-gratuitous intent.

There is no precedent to support any contention that the element of "intent" can be proven in the absence of such "additional compensation".

Petitioner submits, with respect to the

Panel, that the Panel could not have reconciled its ruling on the "thing of value" issue with the precedent, obvious under the statute. The Panel chose not to consider precedent in other Circuits.

Similarly, again with respect, the Panel could not have reconciled its ruling on the "thing of value" element with the precedent in other Circuits, obvious in their rulings on the issue of "intent". The Panel did not rule on the element of "intent".

4. The Gratuity Count - Variance Issue

The government cannot vary from the indictment, in a prosecution under Section 201(g), when the grand jury charges that one party, named in the indictment, gave a public official a gratuity, directly and indirectly, and then prove that only part of the gratuity came from the party named in the indictment and the balance came from a party not named in the indictment.

The indictment in the instant appeal, charged Petitioner with requesting or receiving, "directly or indirectly",

"things of value" of "loans from Merle Weber", in the total amount of "$23,000." The proofs at trial proved that the Petitioner received loans from Weber in the amount of $13,000 and from the Bank, in the amount of $10,000.

The Circuit Court treated Petitioner's issues of variance in one sentence.

> "There is ample evidence in the record indicating the loans (sic) the appellant received from the People's Bank were ARRANGED through Weber. (App. A. infra, p. A11)

The grand jury did not charge Petitioner with "receiving a loan from Merle Weber in the amount of $13,000 and a loan for $10,000 from the People's Bank of McComb Ohio, which had been arranged through Merle Weber." The indictment charged Petitioner with receiving loans from Merle Weber in the amount of $23,000.

There is no way to tell if the grand jury even considered the McComb Bank loan.

Yet, the government treated the McComb loan, not as coming from Weber. There was no evidence that the bank loan came from Weber in any fashion. The bank was not an intermediary, and the Petitioner had the legal and ethical obligation to repay the loan, plus interest, not to Weber but to the bank. Weber was not a co-signer, guarantor or maker of the loan. The funds did not come from any of his accounts and he had no standing to sue the Petitioner for non-payment. The bank loan simply did not come from Weber, directly or indirectly.

The government could have taken any transaction of Petitioner, added it to the transaction charged by the grand jury, and proved the acts charged, that is the total amount of $23,000, found by the grand jury. The government could have then indicted Petitioner for the bank loan,

using the same testimony used at the instant trial. Petitioner would have been unable to plead former jeopardy because the McComb loan was not, on the face of the indictment, considered by the grand jury or charged by that body. No subsequent action by the government could provide criminal acts not charged by the grand jury. United States v. Beeler, 587 F.2d 340 (6th Cir. 1978), including a Bill of Particulars or other explanatory device.

However, evidence at trial made it clear that the government was not presenting the bank loan because the attorneys thought it came from Weber "indirectly", they proved it to provide a subjective display of apparent wrongdoing by Petitioner, because he obtained a loan from a bank in which a subject of one of his criminal investigations had

perpetrated a crime.

The government placed witnesses on who testified that they thought the loan was improper, not because it came from Weber, but because the Petitioner was the AUSA in charge of the Hartley investigation. The FDIC examiner testified that he thought the loan violated the "policy" of the bank, and the loan "might have affected the solvency of the bank." All of the testimony simply tarred the Petitioner as someone who should not have gone to the McComb Bank for a valid loan.

This Court's decision in Stirone v. United States, 361 U.S. 212 (1960) requires a judgment of acquittal when there is a "substantial likelihood" that a defendant may have been convicted of an offense other than that charged by the grand jury. Such is prejudicial per se. United States v. Beeler, 587 F.2d 340 (6th

Cir. 1978). If the Petitioner had the substantial right to be tried, only on charges presented in an indictment by a grand jury, and a significant portion of the "thing of value" charged as a gratuity was proved to come from a party, not named in the indictment, then the ruling in Stirone v. United States, supra, required the district court to grant Petitioner's motion for acquittal.

5. The Conflict of Interest Count - Prejudicial Variance.

The government may not prove a criminal act, charged in an indictment and, at the same time, prove a criminal act not charged in the indictment.

Evidence of prior criminal acts may be presented to prove the intent of the accused. However, proof of criminal acts, not previously adjudicated as "crimes" may not be included. Stirone v. United States, 361 U.S. 212 (1960),

On page 3 of the Circuit Opinion, (App.

A, p. A3) the Court displays evidence, not charged in the indictment, but presented by the government in such a manner as to prejudice the jury. Government witness DeSanctis testified that, days after first meeting her, Petitioner gave her the precise terms that he gave Weber months later, in the so-called employment document, that is, $300,000 per year, etc.

However, DeSanctis went on to testify that Petitioner had solicited a bribe, a clear violation of 18 U.S.C. Section 201(c).

Gorman indicated that either Weber could provide the money, or that two Hartley creditors with potential criminal liability could provide it. He stated that if the creditors provided the money, he would write his report on the Hartley case so as to discourage their prosecution. (App. A, infra, p. A3)

18 U.S.C. Section 201(g) is a lesser included offense, which may be proven with the greater included 18 U.S.C. 201(c) when

both are charged.

However, the greater offense of requesting or receiving a bribe, under 18 U.S.C. Section 201(c), may not be proven where that offense has not been charged by the grand jury in the indictment.

Petitioner was not indicted for violating 18 U.S.C. 201(c) and he was not indicted for offering to write a report which would discourage anyone's prosecution, in return for $300,000, but that is what the government proved, according to the Circuit. (App. A, infra, p. A3)

Again, if the allegations were true and provable the government could have presented the evidence to a grand jury and obtained an indictment. They elected not to do so. Instead, to prove the indicted violation of 201(g), the government producted evidence of a more serious

crime, without having to present any evidence of such an offense to a grand jury, and without having to obtain an indictment on the greater offense.

At the end of the trial there was no way to determine whether Petitioner had been convicted of violating Section 201(g), or 201(c). He could have been convicted for the other "numerous unsavory tactics" which the Circuit failed to describe.

The point is that the government could have followed Petitioner's conviction by indicting Petitioner for soliciting a bribe, under 201(c), using the same testimony which DeSanctis used at his trial for violating 201(g), and the Petitioner could not have offered any proof of former jeorpardy.

There is a substantial likelihood that the Petitioner was convicted of an offense

for which he was not indicted. There is a certainty that the government presented evidence of a major federal felony, of which Petitioner had never been convicted and for which Petitioner had never been indicted.

Accordingly, the motion for acquittal should have been granted. Stirone v. United States, supra,

6. The Conflict of Interest Count - The Negotiation Issue
7. The Conflict of Interest Count - The Prejudicial Variance Issue

Employment discussions which are limited to talk of "potential" employment do not constitute "negotiation" for employment.

When the indictment charges a public official with "negotiating" for employment with a person named in the indictment, and the proofs at trial are "negotiation" with a person not named in the indictment, the proofs constitute a prejudicaial variance from the indictment.

The indictment charged Petitioner with "negotiating" with "Merle C. Weber" for employment, under the charge of Section

208. As part of that proof, the Circuit found the August 27, 1982 discussion with DeSanctis as proof of such "negotiation". (App. A, infra, p. A6). However, negotiation with DeSanctis was not charged in the indictment and Weber and DeSanctis, being separate persons, proof of such "negotiation" varies from the indictment so as to prejudice Petitioner. Stirone v. United States, 361 U.S. 212 (1960).

DeSanctis was not named in the indictment as having any employment discussions, and certainly no "negotiation" with the Petitioner, but when she was called upon to describe a conversation she had with Petitioner on August 27, 1982. She testified on cross-examination that the August 27, 1982 conversation she had with Petitioner only refered to "potential" employment.

We were just talking about POTENTIAL with

NO SPECIFIC TIME, not "right around (sic) or tomorrow" or "a year from now." (TR 62, Sixth Circuit Joint Appendix B, Page 1)

United States v. Conlon, 628 F.2d 150 (D.C. Cir.), cert. denied, 454 U.S. 1149 (1982) is instructive in that it takes the common sense approach to "negotiation", in that it is to be given its common everyday meaning.

If "negotiation" is to be given its common, everyday meaning, then so are terms such as "potential". Public officials speak of employment, practically every day. To rise to the level of "negotiation" , and place public officials in peril of prison for violating Section 208, takes considerably more than conversations involving discussions of "potential" employment.

This cross-examination testimony was stressed to the Panel. There is no

evidence in the Opinion that it was considered.

Regarding "negotiation", all of the public officials in the United States, from time to time, engage in discussions regarding employment. Prior to this case, United States v. Conlon, gave a public official the mandate that "negotiation" will be given its ordinary meaning. In the instant case, the Sixth Circuit has extended "negotiation", as being prosecutable under Section 208, for conversations which are limited to "potential" employment. This is, at least, an unprecedented extension of Conlon, if not a conflict.

Again, the penalties for mistake by a public official are too severe for the Court to permit ambiguity in an area where officials speak, practically, every day.

Regarding the variance, if the grand

jury wished to charge the Petitioner with "negotiating" with DeSanctis, they would have so charged. They did not. Since Weber was not a party to the August 27, 1982 conversation between Petitioner and DeSanctis, proof of such to prove "negotiation" with Weber is per se prejudicial. Stirone v. United States, supra.

Again, the government could have turned around and indicted Petitioner for "negotiating" with DeSanctis on August 27, 1982, using the same testimony of DeSanctis given at trial and the Petitioner could not have pled former jeopardy.

Finally, there was no way for the Petitioner to prepare to defend such a charge, since it was not apparent from the indictment.

Accordingly, there exist numerous

substantial likelihoods that the Petitioner has been convicted of crimes for which he was not indicted. And, again, he was deprived of his right to be tried only on charges returned by a grand jury. Stirone v. United States, supra.

8. The Conflict of Interest Count - The Official Proceedings Issue

In a multi-subject criminal investigation, once proceedings against one or more of the subjects is clearly terminated, a public official, conducting the investigation, may then negotiate for employment with the subjects which are no longer part of the investigation.

The Circuit ruled that Weber had a "financial interest" in the banks which Petitioner investigated, from August of 1982, until January 17, 1983. There is no dispute that the investigation of the banks terminated by that date. The Circuit found the only "financial interest" of Weber to exist in the banks. (App. A, infra, p. A2, A7) The Circuit

found no financial interest in the only remaining subject of the investigation, in existence after January 17, 1983, that is James Hartley. He was sentenced in April, of 1983.

The Circuit ruled that the only "negotiation" prior to February 12, 1983, took place with DeSanctis, on August 27, 1982. (App. A, infra, p. A6) She testified that she had no further conversations with Petitioner regarding employment and Weber testified that he had no conversations with the Petitioner regarding employment until February 12, 1983. Weber testified that he had no employment discussions with Petitioner until February 12, 1983.

If Weber had a "financial interest" only in the banks which Petitioner was investigating, the provisions of Section 208, which would have precluded Petitioner

from negotiating with Weber, would have only applied when Petitioner was investigating the banks. Once the investigation of the banks terminated, that is, as of January 17, 1983, the Petitioner would, no longer, have been conducting an "official proceedings" in which Weber had an interest, and, accordingly, could have validly negotiated with Weber for employment.

There existed no precedent that in a multi-subject investigation, the termination of some subjects precluded the investigator, under the prohibitions of Section 208, from negotiating with the former subjects (assuming clear evidence of termination), simply because the investigation of other subjects continued. Yet, that is what the Circuit found.

...Gorman and DeSanctis, Weber's assitant, engaged in discussions concerning Gorman's prospective employment

with Weber as early as August of 1982. Further, the government's evidence indicated that Gorman wrote his conditions for employment in Weber's presence in February of 1983, and that the HARTLEY INVESTIGATION, IN WHICH WEBER HAD A FINANCIAL INTEREST, WAS CLOSED IN APRIL OF 1983..." (App. A, infra, p. A6-7)

There was no evidence in the Circuit's ruling to indicate that, prior to February 12, 1983, Petitioner "negotiated" with Weber for employment. The August 27, 1982 conversation was with DeSanctis, and even there, the conversation was limited to "potential". The "official proceedings in which the Circuit found Weber to have a "financial interest" terminated on January 17, 1983. Any "negotiation" after that date would not have been precluded by Section 208 because there would have been no "official proceedings" in existence in which Weber would have had a "financial interest". Accordingly, the motion for acquittal should have been granted.

9. The Conflict of Interest Count - The Financial Interest Issue

Congress did not intend the element of "financial interest" to be sufficiently proven where the government's evidence reflects only that the "prospective employer" had a "concern" in the "official proceedings" of the official.

The Circuit's ruling on the "financial interest" issue of this case, is in conflict with the ruling of this Court in United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1960), in that it permits the disqualification prohibitions of Section 208, in instances where the "financial interest" is a "concern" for the "official proceedings".

The Panel found the following to be the proof that Weber had a "financial interest" in Petitioner's investigation of the banks:

"Expert testimony"...that a person with a financial interest in a bankruptcy matter has a "financial interest" in a criminal investigation, because..."if others, including banks are convicted of participating in criminal activity which

harmed the creditors, creditors could seek recovery from such parties. In civil suits, a bank's criminal conviction could be introduced under the doctrine of collateral estoppel, thus making the only remaining issue that of damages. Thus, threats of criminal action against a bank are an effective lever in forcing a settlement in a civil bankruptcy suit, as a bank may choose to settle in order to avoid a measure of culpability, or just in an attempt to avoid the adverse publicity associated with a criminal investigation." (App. A, infra, p. A2,3)

"Expert testimony indicated that criminal investigations against banks accused of cooperating or conspiring with a criminal bankrupt could prompt their settlement with the bankrupt's creditors, at times regardless of the bank's culpability. Gorman was investigating these banks. These facts could cause the jury to find that Weber stood a real possibility of sustaining financial gain or loss as a result of the official actions Gorman was undetaking." (App. A, infra, p. A7)

There was no "expert" testimony offered or given at the trial of the Petitioner.

DeSanctis testified that there was no nexus whatsoever between the Hartley bankruptcy and the Hartley criminal acts. According to DeSanctis, the above represented only a scheme to get money out

of the banks, with no basis in fact, or legal theory by which the banks ever had a duty to pay the Hartley creditors.

There was nothing in Petitioner's criminal investigation which involved the bankruptcy, save the fact that the bankrupt and the subject of the criminal investigation were the same person, and the Circuit did not find Weber to have a "financial interest" in Petitioner's investigation of Hartley, only in the banks.

Petitioner was not investigating the bankruptcy of Hartley.

Hartley's check kite did not affect his business creditors. The kite was a fraud on the banks.

Weber had no "financial interest", which would, using established standards for defining the term, have placed the Petitioner on notice that Section 208

reguired Petitioner to remove himself from the investigation of the banks.

Weber was not a stockholder, director, officer, employee, agent, depositor, borrower, guarantor, or lienholder of the banks, which were the subjects of Petitioner's investigation. If those banks made millions or went bankrupt Weber would not have been in a position to gain or lose financially,

The Office of Government Ethics defined "financial interest" as existing when there is the "real" as opposed to "speculative" possibility of financial gain. (App. A, infra, p. A7)

The evidence of financial interest, produced by the government, did not display Weber as having a "real" as opposed to "speculate" "possibility of financial gain, in the investigation of the banks.

The Panel held that the evidence existed to Petitioner so that he should have disqualified himself from his investigation because of the "financial interest." Because Petitioner did not remove himself, he is now, according to the Panel, required to spend one year and one day in federal prison.

Petitioner can only display the evidence to this Court and make the following points:

1. There is nothing known to the Petitioner which suggests or requires any government agency, investigating a bank or anyone else to cease or reduce the investigation or punishment of any subject of a criminal investigation because the subject has given back the things stolen. That's what the Circuit is saying about the banks in the instant case. They "could" have settled, with creditors who

the banks determined had no legal right to make a claim against them, with no legal theory for recovery because such settlement "could" have, in the minds of the directors of the banks, "avoided a measure of criminal culpability", which they did not have in the first place. The Circuit did not elaborate on how such settlement "could" have "avoided the adverse publicity associated with a criminal investigation."

2. How far may the government go to secure a conviction of a public official under Section 208? A great many citizens come within the prohibitions of Section 208. If the "financial interests", which, under penalty of fine and imprisonment, must be determined by the officials, then they deserve to be warned that the phrase is no longer limited to the traditional "interests" of ownership and control,

which the public officials use in their ethical decisions.

According to the Sixth Circuit, officials must now look into the minds of those subjects of official proceedings to determine if they might consider settling an unrelated matter, and into the minds of prospective employers to determine if they have an "interest", meaning "concern", "excitement", " passion", even "phsycopathic obsession", all of which are synonimous with "interest"

This Court has never, really, taken on the issue, of what Congress intended with the term "financial interest" under Section 208. This Petition represent a criminal case where the government has stretched the term, farther than Congress intended it to go. Even the ruling in United States v. Mississippi Valley Generating Co., supra, treated the issue

in an obtuse fashion.

Public officials must know what these terms mean to conduct their lives in safety.

It is unlikely that the Court will ever see a more patently speculative "financial interest" as was found by the Sixth Circuit to have been proven in this case.

From the Petitioner's standpoint, the issue before the Court is whether the evidence accepted by the Circuit represents a "real" possibility of gain.

From the standpoint of every other public official, who must make a decision as to "financial interest", given this Court's decision in United States v. Mississippi Valley Generating Co., supra, and the definition of the Office of Government Ethics, supra,...and the ruling of the Sixth Circuit in the instant case, if the Court wishes to instruct public

officials as to the intent of Congress in Section 208, as to every element, there, probably, will never be a better case through which to do so.

10. The Conflict of Interest Count - The Knowledge Issue

In federal prosectutions of violations under Section 208, the government must sufficiently prove that the public official had knowledge of the "financial interest" which the government proved at trial.

This Court has reviewed the "financial interest" which the Circuit ruled to exist in the instant case. Petitioner's argument was that he had no knowledge of the "financial interest" displayed by the Circuit.

In the Opinion, the Circuit, as evidence of the "knowledge" element, reasoned that Petitioner was aware of the prospective employer's concern for his investigation, which the Circuit interpreted as "interest". However, the

Circuit did not rule on Petitioner's issue, which was that he had no knowledge of the "financial interest" which was proved at trial.

The Ciruit has ruled, therefore, that the "knowledge" which Congress has imposed upon officials, extends to synonyms of the word "interest", to mean, concern, care, passion and the rest. Such was not contemplated by Congress.

The Government did a pretty good job of painting the Petitioner as a bad person, but they offered no proof that he had any knowledge of the financial interest, which the Circuit ruled to exist.

In the absence of any such knowledge, an element of the offense could not be proven, and the motion for acquittal should have been granted.

11 Proof Beyond a Reasonable Doubt.

The burden of proof in a criminal case is

"beyond a reasonable doubt. The Circuit's ruling that the a link in the chain of circumstantial evidence did only "strongly indicate" guilt, was insufficient for a jury to find guilt beyond a reasonable doubt. The Panel found, in the gratuity count, that the loan from Weber was a gratuity because the evidence did "strongly indicate" that he could not have gotten a similar loan anywhere else. (App. A, infra, p. A9)

The burden of proof for the government in a criminal trial is "beyond a reasonable doubt. United States v. O'Boyle, 680 F.2d 34 (6th Cir. 1982).

CONCLUSION

For the reasons stated herein the Petitioner prays that a Writ of Certiorari will issue from this Court to the United States Court of Appeals for the Sixth Circuit.

Paul G. Gorman
Petitioner
7113 Hollywyck
Maumee, Ohio 43537

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-3361

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL G. GORMAN,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed December 23, 1986

Before: MILBURN and BOGGS, Circuit Judges; and HARVEY,* Senior District Judge.

HARVEY, Senior District Judge. Following a jury trial in the United States District Court for the Northern District of Ohio, appellant Paul G. Gorman was convicted on one count of conflict of interest, in violation of 18 U.S.C. § 208, and one count of asking for or receiving illegal gratuities, in violation of 18 U.S.C. § 201(g). The district court sentenced Gorman to a term of imprisonment of one year and one day on each count, the sentences to run concurrently. Gorman now appeals. We affirm the trial court.

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*The Honorable James Harvey, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX "A"

Gorman was an Economic Crime Specialist and an Assistant United States Attorney assigned to the United States Attorney's Office for the Northern District of Ohio in Toledo. From August of 1982 through February or April of 1983, he was the lead prosecutor investigating a check kiting scheme which involved a bankrupt, James Hartley, and several banks with which Hartley had dealt. Gorman worked closely on the case with Merle Weber, (later indicted with Gorman) a creditors' representative from Phoenix, Arizona who was hired by a number of Hartley's creditors to recover his outstanding debts. Weber was to receive 10% of the funds recovered by those creditors.

The trustee of this bankruptcy was Quentin Derryberry of Wapakoneta, Ohio. He was assisted by a law clerk named Christine DeSanctis. In November of 1981, Weber contacted Derryberry and began to work with him on the case. As time went on, Weber took control of the case, and DeSanctis began to work for him.

In the course of his work, Weber concluded that Hartley engaged in a massive check kiting and illegal bank stock transfer scheme related to the bankruptcy. In all, it appeared that as much as $12.5 million in assets might be available for creditors in the bankruptcy, potentially resulting in a huge fee for Weber.

Expert testimony at trial indicated that any money a criminal bankrupt earns subsequent to bankruptcy is subject to creditors' claims. If others, including banks, are convicted of participating in criminal activity which harmed the creditors, creditors could seek recovery from such parties. In civil suits, a bank's criminal conviction could be introduced under the doctrine of collateral estoppel, thus making the only remaining issue that of damages. Thus, threats of criminal action against a bank are an effective lever in forcing a settlement in a civil bankruptcy suit, as a bank may choose to settle in order to avoid a measure of culpability, or just in an

attempt to avoid the adverse publicity associated with a criminal investigation.

In the summer of 1982, Weber sought to expedite matters by seeking the criminal investigation of various banks and individuals associated with Hartley. He, Derryberry, and DeSanctis first met with Gorman in the U.S. Attorney's Office in Toledo on August 10, 1982. Gorman indicated he would pursue the case.

During a later conversation, DeSanctis told Gorman she and Weber were planning on forming a creditors' representative business when she left law school, and that the funds to start it would come from the proceeds of the Hartley case. On August 27, 1982, Gorman met DeSanctis at her apartment and stated that he would like to work with her and Weber. He further stated that, as a condition of employment, he would need $300,000.00 put in an escrow account to guarantee him two years salary. Gorman indicated that either Weber could provide the money, or that two Hartley creditors with potential criminal liability could provide it. He stated that if the creditors provided the money, he would write his report on the Hartley case so as to discourage their prosecution.

Gorman made frequent inquiries to Weber and DeSanctis concerning employment with them, and indicated his position with the U.S. Attorney's Office would be of great benefit in doing creditor representative work across the country. Furthermore, shortly after his initial meeting with Weber, Gorman prepared a document outlining the number of people involved in the Hartley matter and the charges which could be brought against them, and forwarded the document to Weber. Gorman also kept Weber apprised of grand jury proceedings in the Hartley case, and discussed how to time grand jury subpoenas to put extra pressure on banks to settle, as well as numerous other unsavory tactics.

On February 12, 1983, Gorman and Weber met for breakfast in Maumee, Ohio. During this time, Gorman wrote down

what his conditions for employment with Weber would be. These conditions were similar to those he previously outlined to DeSanctis. Weber allowed Gorman to believe these conditions would be established. Gorman continued to press the issue, however, and Weber stalled. This eventually led to a falling out between the two on March 30, 1983. The Hartley file was closed in April, 1983.

At all relevant times, Gorman was in dire financial straits having, among other things, gone over $25,000 over budget in the construction of his new home, in which he acted as general contractor. In early November of 1982, Gorman agreed to accept a $25,000 loan from Weber. As the money was not immediately forthcoming, Gorman flew to Phoenix unannounced around Christmas of 1982 to demand the money personally. He eventually contacted Weber, who was in Montana at the time, by phone. Gorman told Weber he needed $2,000 that day to pay contractors' bills, and that if he did not receive the money he would lose his job and the Hartley investigation would stop. On December 27, 1982, Weber arranged for $2,000 cash to be taken from the account of a Mr. Huffman, the Chairman of the Board of the People's Bank of McComb, Ohio, and delivered to Gorman's wife at a motel in Findlay, Ohio. This was a loan from Huffman to Weber for the purpose of making a loan to Gorman.

On December 28, 1982, another loan was made using a similar procedure. This loan was for $3,500.

On January 3, 1983, Gorman demanded another $10,000 from Weber, again under threat that his job would be lost and the Hartley investigation stopped if he did not receive the money. Weber again called Huffman and arranged for Gorman to receive immediately a $10,000 unsecured personal loan from the McComb bank.

Testimony at trial showed the extent of Gorman's financial difficulties. His monthly income was $2,515, and his monthly liabilities were $3,428, exclusive of outstanding construction

debts. Despite this, Gorman repaid Weber and the bank in full, with interest (although without late fees) on May 6, 1983. In order to do so, he obtained a loan from Huntington Bank in Toledo. The loan was very reluctantly granted on the conditions that Gorman give a third mortgage on his home, tear up his credit cards, develop a financial recovery plan and review it periodically with the bank, attempt to sell his house, and agree to have his wife go back to work.

Gorman was convicted on one count each of violation of 18 U.S.C. § 208 and 18 U.S.C. § 201(g). On appeal, he claims the trial court erred in denying his motion for judgment of acquittal on both counts, and that the government's proofs varied prejudicially from the indictment.

I. The "Conflict of Interest" Count

Gorman claims the trial court erred in denying his motion for judgment of acquittal as to his indictment under 18 U.S.C. § 208. Section 208(a) states as follows:

> Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse . . . or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—
>
> Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

18 U.S.C. § 208(a).

Accordingly, a violation of Section 208 in this case required proof: 1) that Gorman, who was at the time in question a federal government employee, negotiated concerning employment with Weber; 2) that Weber had a financial interest in the judicial proceedings conducted by Weber at the time the negotiations were taking place; and 3) that Gorman knew of this interest.

Gorman first claims the trial court erred in denying his motion because there was insufficient evidence that he was negotiating for employment with Weber. The proper standard for evaluating a motion for judgment of acquittal is whether, considering the facts in the light most favorable to the government, there is evidence from which a jury might find the defendant guilty beyond a reasonable doubt. If such evidence exists, the motion must be denied. *United States v. O'Boyle*, 680 F.2d 34 (6th Cir. 1982).

"Negotiation" is to be given its common, everyday meaning for purposes of Section 208(a). *United States v. Conlon*, 628 F.2d 150, 154 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1149 (1982). The government set forth substantial evidence showing that such negotiation had taken place, including Gorman's initial conversation with DeSanctis and his list of his conditions for taking employment with Weber. This in itself is clearly enough evidence for the jury to conclude beyond a reasonable doubt that Gorman had been "negotiating" with Weber for employment. Therefore, the trial court did not commit error by denying Gorman's motion for this reason.

Gorman next argues that his motion should have been granted because all the alleged negotiations took place after the Hartley investigation ended. Taking the evidence in the light most favorable to the government, it was shown that Gorman and DeSanctis, Weber's assistant, engaged in discussions concerning Gorman's prospective employment with Weber as early as August of 1982. Further, the government's evidence indicated that Gorman wrote his conditions for

employment in Weber's presence in February of 1983, and that the Hartley investigation, in which Weber had a financial interest, was closed in April of 1983. It is therefore clear this assignment of error is without merit.

Next, the appellant argues that the district court should have granted his motion because the government provided insufficient evidence to show that Weber had a cognizable financial interest in the outcome of his investigation of the Hartley bankruptcy. A financial interest exists on the part of a party to a Section 208 action where there is a real possibility of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment. Office of Government Ethics Advisory Opinion, 83 OGE 1 (January 7, 1983).

The evidence presented by the government in this case showed Weber had a 10% contingent fee arrangement with Hartley's creditors. Expert testimony indicated that criminal investigations against banks accused of cooperating or conspiring with a criminal bankrupt could prompt their settlement with the bankrupt's creditors, at times regardless of the banks' culpability. Gorman was investigating these banks. These facts could cause the jury to find that Weber stood a real possibility of sustaining financial gain or loss as a result of the official actions Gorman was undertaking. Accordingly, this assignment of error is also meritless.

The final assignment of error as to this count is that there was no proof that Gorman knew Weber was using the criminal investigation to further civil actions in which he was financially interested. Gorman, however, misstates the intent element of Section 208. Section 208 sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1960).[1] The

[1] *United States v. Mississippi Valley Generating Co.* was directed at 18 U.S.C. § 434, the predecessor to Section 208. The case remains

specific standard applicable in the present case is that the defendant must have known that the person with whom he was negotiating concerning employment had a financial interest in the defendant's official work. *See K & R Engineering Co. v. United States*, 616 F.2d 469, 472 (Ct. Cl. 1980).

The evidence at trial consistently indicated that Gorman knew Weber had a financial interest in the Hartley -related cases. For example, Gorman kept Weber and DeSanctis fully apprised of confidential grand jury activity in the Hartley case. Further, Gorman repeatedly threatened Weber with the ruin of the criminal investigation of the banks if he did not immediately receive loans from him. As this final claim of error is also without merit, the district court clearly acted correctly in denying Gorman's motion for judgment of acquittal with respect to this count.

II. The "Illegal Gratuity" Count

Gorman further argues that the trial court erred in denying his motion for judgment of acquittal as to his indictment under 18 U.S.C. § 201(g). Section 201(g) states as follows:

> Whoever, being a public official, . . . otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him [shall be guilty of an offense.]

18 U.S.C. § 201(g).

The appellant argues that there was insufficient evidence to uphold his conviction under this statute. Specifically, he

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applicable, however, as the purpose of Section 208 is to "strengthen" its predecessor without changing any of its underlying policies. *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1149 (1982).

argues that the loan and promises of future employment were not "things of value" for purposes of Section 201(g), that the government failed to prove the requisite criminal intent, and that the government's proofs varied prejudicially from the indictment.

Gorman argues that the loans he received from Weber were not "things of value" because he repaid them in full with interest. As such, he argues, he merely entered into an economic exchange, receiving something for which he paid a fair price. Although this argument is logical, it is meritless under Section 201(g).

The purpose of Section 201(g) is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of an item of value given to him by reason of his position. *United States v. Evans*, 572 F.2d 455, 480 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978). Contrary to the appellant's argument, there is no authority for the proposition that the items received must be "gratuities" as that term is commonly understood. In order to put the underlying policy of the statute into effect, the term "thing of value" must be broadly construed. Accordingly, the focus of the above term is to be placed on the value which the defendant subjectively attaches to the items received. *United States v. Williams*, 705 F.2d 603, 623 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

The loans which Gorman received are things of value for purposes of Section 201(g). There is no dispute that the appellant was having severe financial difficulties during the time period in question. Additionally, the numerous conditions on the loan which Gorman received from the Huntington Bank strongly indicate that he could not have received substantial unsecured loans at all, much less on extremely short notice. The receipt of such loans from Weber therefore would have had an objective, as well as a subjective, value to Gorman over and above their market price. These loans would,

therefore, qualify as things of value under the broad subjective definition set forth under Section 201(g).

A similar analysis applies to the future employment promised the appellant by Weber. Gorman argues that the future employment with Weber would not have been a thing of value because any compensation received would have been for additional duties performed. However, Gorman neglects to indicate that the employment with Weber would have paid him $150,000 per year for two years. This was approximately three times his salary as an Assistant United States Attorney. Additionally, he was to stay with the United States Attorney's Office full time during this two-year period, using that job, in part, to refer cases to Weber. Considering Gorman's precarious financial situation, such future employment would clearly be a thing of value for purposes of Section 201(g).

Next, Gorman argues that the government did not prove that he sought or received either the future employment or the loans "for or because of any official act performed or to be performed by him" as required by Section 201(g). Once again, the issue to be resolved is whether, when considering the facts in the light most favorable to the government, evidence exists from which the jury might find the defendant guilty beyond a reasonable doubt. *United States v. O'Boyle*, 680 F.2d 34 (6th Cir. 1982). We conclude that such evidence was presented at trial.

With respect to the loans, evidence was presented which showed that Gorman repeatedly threatened Weber that his investigation of the Hartley bankruptcy would end if he did not receive the loans he requested. With respect to Gorman's future employment with Weber, the government presented evidence which indicated Gorman was to stay on with the United States Attorney's Office while working with Weber at least in part for the purpose of referring Hartley-type cases to Weber. As such, this assignment of error is without merit.

Finally, the appellant argues that proofs under this count varied from the indictment to the extent that the indictment

was constructively amended. A variance occurs when the proof introduced at trial differs materially from the facts alleged in the indictment. Variances which create a substantial likelihood that a defendant may have been convicted of an offense other than that charged by the grand jury are constructive amendments, and are considered per se prejudicial. *United States v. Beeler,* 587 F.2d 340 (6th Cir. 1978), *cert. denied,* 454 U.S. 860 (1981). In the present case, the appellant has failed to show that any sort of variance exists.

In support of his argument, Gorman claims that the indictment stated he received $23,000 in loans from Weber, although the evidence showed he received only $13,000 from Weber, the remainder coming from loans granted by the People's Bank of McComb, Ohio. This argument, however, shows an extremely limited view of the record. The pertinent part of the indictment alleges that Gorman "did, directly and indirectly, . . . receive things of value from Merle C. Weber, that is, loans totaling $23,000 . . . ." There is ample evidence in the record indicating the loans the appellant received from the People's Bank were arranged through Weber. The proofs at trial thus adhered strictly to what was alleged in the indictment, thus rendering this assignment of error frivolous.

We therefore conclude that all of the appellant's assignments of error as to both counts of his conviction are without merit. Accordingly, the judgment of the district court is hereby AFFIRMED.

No. 85-3361

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee	)	
v.	)	ORDER
PAUL G. GORMAN Defendant-Appellant	)	

BEFORE: MILBURN and BOGGS, Circuit Judges, and HARVEY* Senior U.S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of thd case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

*Hon. James Harvey sitting by designation

Appendix "B"

18 U.S.C. Section 201(g)

Whoever, being a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him [shall be guilty of an offense].

18 U.S.C. Section 208

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government...participates personally and substantially as a Government officier or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse...or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest [shall be guilty of an offense]

Appendix C

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2)

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1625

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAUL G. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a public official who receives lucrative offers of future employment and unsecured loans in return for the performance of an official act has received "anything of value" within the meaning of the illegal gratuity statute, 18 U.S.C. 201(g).

2. Whether the proof at trial varied from the indictment in a way that prejudiced petitioner.

3. Whether the evidence was sufficient to support petitioner's conviction for participating as a public official in a matter in which he had a conflict of interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1625

PAUL G. GORMAN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 807 F.2d 1299.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1986. A petition for rehearing was denied on February 6, 1987 (Pet. App. B1). The petition for a writ of certiorari was filed on April 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of participating in a matter in which he had a conflict of interest, in violation of 18 U.S.C. 208(a), and on one count of receiving illegal gratuities, in violation of 18 U.S.C. 201(g). He was sentenced to concurrent terms of a year and a day in prison. Pet. App. A1.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A5). In brief, the evidence showed that in late 1982 and early 1983 petitioner solicited personal loans and a lucrative offer of employment from co-defendant Merle Weber while petitioner served as an Economic Crime Specialist and an Assistant United States Attorney in the Office of the United States Attorney for the Northern District of Ohio. The evidence also showed that Weber had a substantial financial interest in an investigation petitioner was conducting at the time and that petitioner provided Weber with confidential information about the investigation.

During proceedings involving the bankruptcy of James Hartley, information came to light that implicated Hartley and several banks in a check-kiting scheme. Petitioner was the lead prosecutor investigating that scheme, an assignment he performed between August 1982 and April 1983. Co-defendant Merle Weber was a creditors' representative who had been retained in connection with the Hartley bankruptcy by a number of Hartley's creditors under an agreement that would have paid Weber 10 percent of the funds recovered by those creditors. During the time he represented the creditors, Weber

became of the opinion that Hartley had engaged in a massive check kiting and illegal bank stock transfer scheme with several banks. Weber concluded that if the scheme could be proved, it could result in a recovery of $12.5 million for the creditors, which would produce a $1.25 million fee for Weber. Pet. App. A2.

In the summer of 1982, Weber sought to enhance his leverage over the banks against which the creditors had potential claims by augmenting his efforts with the threat of a criminal investigation. It was Weber's hope that the potential liability and attendant publicity of a criminal proceeding would stimulate the banks to settle quickly with the creditors. To that end, Weber met with petitioner and urged that he institute a criminal investigation of various banks and individuals associated with Hartley. Petitioner indicated that he would pursue the case. Shortly after that initial meeting, petitioner prepared a document listing the persons involved in the Hartley matter and the charges that could be brought against them, and he forwarded the document to Weber. Petitioner also kept Weber apprised of the grand jury proceedings in the Hartley case and discussed, among other things, how to time grand jury subpoenas to put extra pressure on the banks to settle Weber's claims. Pet. App. A2-A3.

On at least two occasions—shortly after their initial meeting and again in February 1983—petitioner discussed his prospects for employment with the creditors' representative business that Weber and his assistant, Christine DeSanctis, planned to establish with the proceeds from the Hartley case. At a meeting in DeSanctis's apartment in August 1982, petitioner told DeSanctis that, as a condition of employ-

ment, he would require a guarantee in advance of two years' salary—a total of $300,000. That money, petitioner said, should be placed in an escrow account, with the funds to be provided either by Weber or by two Hartley creditors who faced potential criminal liability. Petitioner added that if the money were provided by the creditors, then petitioner's report on the Hartley case would discourage prosecution of those creditors. Petitioner repeated his demands to Weber in February 1983. Weber allowed petitioner to believe his conditions would be met. When petitioner pressed the issue, however, Weber stalled. The two eventually had a falling out on March 30, 1983. The Hartley criminal investigation was closed, without ~~construction~~ prosecution of the banks, in April 1983. Pet. App. A3-A4.[1]

Throughout the period that he worked on the Hartley matter, petitioner experienced severe financial difficulties, including a $25,000 cost overrun in the construction of a new residence. In early November 1982, petitioner agreed to accept a $25,000 loan from Weber. When Weber failed to produce the funds by Christmas 1982, petitioner flew unannounced from Toledo, Ohio, to Phoenix, Arizona, to demand the money personally. Weber was in Montana at the time, and petitioner eventually reached him by telephone. Petitioner told Weber he needed $2,000 that day to pay his contractors' bills and that if he did not

[1] Petitioner's discussions with DeSanctis and Weber about future employment were not limited to those two occasions. As the court of appeals noted (Pet. App. A3), petitioner frequently broached the subject of working for the creditors' representative business that Weber and DeSanctis proposed to establish and suggested that his position with the United States Attorney's office gave him access to information that would be of great benefit to that venture.

receive the money he would lose his job and the Hartley investigation would be closed. On December 27, 1982, Weber arranged for $2,000 in cash to be taken from the account of the Chairman of the Board of the People's Bank of McComb, Ohio, and to be delivered to petitioner's wife at a motel in Findlay, Ohio. The evidence showed that this transaction was structured as a loan from the bank chairman to Weber for the purpose of making a loan to petitioner. On December 28, 1982, a loan in the amount of $3,500 was made to petitioner using a similar procedure. Pet. App. A4.

On January 3, 1983, petitioner demanded an additional $10,000 from Weber, again under the threat that petitioner would lose his job and the Hartley investigation would be closed if petitioner did not receive the money. Weber again called the bank chairman and arranged for petitioner immediately to receive a $10,000 unsecured personal loan from the McComb bank.[2] Pet. App. A4.

2. Petitioner challenged his convictions on a number of evidentiary grounds. The court of appeals affirmed (Pet. App. A1-A11).

a. With regard to the conflict of interest count, the court of appeals rejected each of the four challenges petitioner raised to the sufficiency of the evi-

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[2] Petitioner subsequently repaid Weber and the bank with interest (although without late fees) on May 6, 1983. In order to do so, he obtained a loan from the Huntington Bank in Toledo under stringent conditions and financial monitoring procedures required by the bank: petitioner had to encumber his residence with a third mortgage, destroy his credit cards, develop a financial recovery plan for periodic review by the bank, attempt to sell his house, and arrange for his wife to return to work. Pet. App. A5.

dence.[3] First, the court concluded that the evidence showed that, during the relevant period, petitioner was "negotiating * * * concerning prospective employment" within the meaning of the statute. The court observed (Pet. App. A6) that while petitioner was investigating the Hartley matter, he met separately with DeSanctis and Weber and on each occasion furnished a "list of his conditions for taking employment with Weber." The court concluded that "[t]his in itself is clearly enough evidence for the jury to conclude beyond a reasonable doubt that [petitioner] had been 'negotiating' with Weber for employment" (*ibid.*).

The court also rejected petitioner's claim that any negotiations that may have taken place occurred only after the Hartley investigation ended. The court observed (Pet. App. A6-A7) that petitioner and DeSanctis first spoke about prospective employment in August 1982, that petitioner discussed the same subject with Weber in February 1983, and that the Hartley investigation was not closed until April 1983.

The court similarly rejected the proposition that Weber had no financial interest in the outcome of the criminal investigation into Hartley's financial affairs. The court concluded that Weber's 10 percent contingent fee arrangement with Hartley's creditors entitled the jury "to find that Weber stood a real possibility of sustaining financial gain or loss as a

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[3] The federal conflict of interest statute, 18 U.S.C. 208(a), prohibits any officer or employee of the Executive Branch from participating in any matter or proceeding "in which, to his knowledge, he, * * * or any person or organization with whom he is negotiating * * * concerning prospective employment, has a financial interest * * *."

result of [petitioner's] official actions" (Pet. App. A7). Finally, the court found the evidence sufficient to show that petitioner knew that Weber stood to benefit from the Hartley investigation. The court stated (*id.* at A8) that petitioner "kept Weber and DeSanctis fully apprised of confidential grand jury activity" in the case and "repeatedly threatened Weber with the ruin of the criminal investigation of the banks if he did not immediately receive loans" (*ibid.*).

b. The court also rejected petitioner's challenges to his conviction for receiving illegal gratuities.[4] It found no merit to petitioner's claim (see Pet. App. A9) that only cash or cash equivalents fall within the scope of the statutory prohibition and therefore that the loans and promises of future employment he solicited did not constitute "anything of value" within the meaning of the statute. The court observed (*ibid.*) that there is no authority for petitioner's narrow reading of the statute and that in order to serve the purpose of the statute, "the term 'thing of value' must be broadly construed." Relying on *United States* v. *Williams*, 705 F.2d 603, 623 (2d Cir.), cert. denied, 464 U.S. 1007 (1983), the court held that "the value which the defendant subjectively attaches to the items received" is relevant for purposes of determining whether such items are "anything of value" under the statute (Pet. App. A9).

The court then turned to the particular "things" petitioner solicited from Weber—loans, which he ultimately repaid, and an offer of future employment.

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[4] The federal gratuities statute, 18 U.S.C. 201(g), prohibits a public official from directly or indirectly soliciting or receiving "anything of value for himself for or because of any official act performed or to be performed by him."

Both of those benefits, the court concluded, are "things of value" under the statute. The loans in question constituted "things of value" because, unlike the loan petitioner later obtained from a commercial bank, the loans from Weber were obtained on extremely short notice, were unsecured, and contained none of the strict conditions that were imposed in connection with the commercial loan. As the court of appeals stated, "the numerous conditions of the [commercial] loan * * * strongly indicate that [petitioner] could not have received substantial unsecured loans at all, much less on extremely short notice. The receipt of such loans from Weber therefore would have had an objective, as well as a subjective, value to [petitioner]" (Pet. App. A9).

The court also concluded that Weber's offer of a job was a "thing of value." The court rejected petitioner's argument that "any compensation received would have been for additional duties performed" (see Pet. App. A10), observing that petitioner's salary as an employee of Weber's would have been three times his government salary and that one of the conditions of his employment with Weber was that he remain with the United States Attorney's office and that he "us[e] that job, in part, to refer cases to Weber" (*ibid.*). The court further concluded that, "[c]onsidering [petitioner's] precarious financial situation," an offer of future employment would clearly have been valuable to petitioner (*ibid.*).

The court similarly found no merit to petitioner's challenge to the sufficiency of the evidence showing that he performed an "official act" in exchange for receiving a thing of value. As the court stated, "[w]ith respect to the loans, * * * [petitioner] repeatedly threatened Weber that his investigation of

the Hartley bankruptcy would end if he did not receive the loans he requested" (Pet. App. A10). Likewise, with respect to the offer of employment, the court concluded that the offer was in connection with an "official act" because it was contingent upon petitioner's remaining an Assistant United States Attorney and thereby "referring Hartley-type cases to Weber" (*ibid.*).

Finally, the court rejected petitioner's claim that a variance existed between the indictment and the proof at trial. Petitioner argued (see Pet. App. A11) that the indictment charged him with receiving loans from Weber totaling $23,000, when in fact Weber lent him only $13,000, with the remaining $10,000 coming from the People's Bank of McComb, Ohio. But the court of appeals noted that the indictment charged petitioner with receiving a total of $23,000 in loans "directly and indirectly" from Weber, and the evidence established that those loans petitioner did not receive directly from Weber he received indirectly, since it was Weber who arranged the $10,000 unsecured loan from the McComb bank (*ibid.*).

ARGUMENT

1. Petitioner renews (Pet. 13-33) his claim that he did not receive "anything of value" from Weber within the meaning of 18 U.S.C. 201(g), and he asserts that the decision of the court of appeals to the contrary conflicts with decisions of other courts of appeals. Specifically, he claims that every other court that has considered the issue has concluded that to violate Section 201(g), a government official must solicit or receive compensation additional to his official salary "in the forms of gifts or gratuities for [his] official acts * * *" (Pet. 14 (emphasis omit-

ted)). Petitioner's attempt to limit the reach of the statute, however, is unsupported by the case law upon which he relies.

Petitioner correctly notes (Pet. 18-19, 23-24) that several courts of appeals have described Section 201 as prohibiting the receipt by public officials of "additional compensation or a tip or gratuity for or because of an official act." *United States* v. *Irwin*, 354 F.2d 192, 196 (2d Cir. 1965). See *United States* v. *Brewster*, 506 F.2d 62, 72-73 n.26 (D.C. Cir. 1974) (Section 201 prohibits *inter alia* the payment to "an official [of] a sum which he is not entitled to receive"); *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870 (1978) (Section 201 "reach[es] any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position"). But each of those cases involved a defendant who made cash payments to public officials. Those courts did not conclude, or even suggest, that the scope of Section 201 is limited exclusively to cash payments. Instead, each court recognized—as did the court of appeals in this case (see Pet. App. A9)—that Section 201 casts a larger net. Thus, in *Evans*, the Fifth Circuit noted that Section 201 is to be "broadly construed" (572 F.2d at 480). Accord *United States* v. *Williams*, 705 F.2d 603, 623 (2d Cir.), cert. denied, 464 U.S. 1007 (1983). And in *Brewster*, the District of Columbia Circuit noted only that Section 201 is "primarily," but not exclusively, concerned with cash payments (506 F.2d at 72 n.26). See also *United States* v. *Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986), cert. denied, No. 85-2031 (Oct. 14, 1986) (a "thing of value" is "not limited * * * to tangible things with an identifiable commercial price

tag").[5] As the loans and job offer were plainly things of value to petitioner, the court of appeals did not err in affirming his conviction under Section 201(g).[6]

2. Petitioner contends (Pet. 37-51) that the evidence at trial on the gratuity count varied from the indictment in three respects: (1) the evidence established that Weber directly lent him $13,000 and arranged for an additional bank loan of $10,000, but the indictment failed to charge him with receiving the proceeds of loans "*arranged* through * * * Weber" (*id.* at 38 (emphasis in original)); (2) the prosecu-

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[5] The other cases cited by petitioner (Pet. 14) do not help him at all. In *United States* v. *Umans*, 368 F.2d 725, 728 (2d Cir. 1966), the court merely stated that the gratuities statute requires proof "that payment was made to an agent in a situation where no payment was necessary"; nothing in the court's opinion suggests that the gratuity (or "payment") must be in cash or a cash equivalent. *United States* v. *Niederberger*, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978), and *United States* v. *Hare*, 618 F.2d 1085 (4th Cir. 1980), do not address the issue; to the extent that they are pertinent at all, they support the analysis of the court of appeals, as both cases involved gratuities other than an outright gift of cash—a golfing trip in one case and a loan under favorable conditions in the other.

[6] Petitioner suggests (Pet. 33-37) that the court of appeals failed to locate evidence in the record establishing that he sought the loans or the employment offer "for or because of any official act performed or to be performed by him." This claim is frivolous. The court of appeals found clear evidence of petitioner's unlawful intent in the fact that he "threatened Weber that his investigation of the Hartley bankruptcy would end if he did not receive the loans he requested" and agreed to remain in the government "while working with Weber at least in part for the purpose of referring Hartley-type cases to Weber" (Pet. App. A10).

tion introduced evidence that petitioner solicited bribes from certain investigative targets, yet it failed to charge him with accepting bribes in violation of 18 U.S.C. 201(c) (Pet. 42-46); and (3) the evidence showed that petitioner negotiated with both Weber and DeSanctis, while the indictment charged him with negotiating only with Weber (*id.* at 46-51).

Petitioner failed to raise the latter two variance claims below, and he is therefore foreclosed from raising them in this Court for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, all three claims are entirely lacking in merit.

Petitioner's first contention was answered by the court of appeals. The court noted that the indictment charged petitioner with "'directly and indirectly * * * receiv[ing] things of value from * * * Weber, that is, loans totaling $23,000'" (Pet. App. A11). The evidence at trial, moreover, established that Weber directly lent petitioner $13,000 and indirectly provided an additional $10,000 by arranging for petitioner to receive that sum from a bank immediately, and without posting any security (see *id.* at A4).

The remaining contentions—which petitioner did not raise below—are equally unfounded. First, he claims that the prosecution introduced evidence that he solicited a bribe, yet charged him only with what he characterizes as the lesser included offense of soliciting and receiving a gratuity. The evidence to which he points in support of this claim is DeSanctis's testimony that petitioner said that his requested

annual salary of $150,000 could be paid either by Weber or by two Hartley creditors who faced potential criminal liability (see Pet. App. A3). But this evidence was surely probative of petitioner's guilt on the gratuity charge. And, while the evidence also might have been probative if petitioner had been charged with bribery,[7] that does not diminish its admissibility to establish, as one element of the gratuity charge, that petitioner, with criminal intent, solicited the employment offer from Weber and DeSanctis "for or because of any official act * * * to be performed by him" (18 U.S.C. 201(g)).[8]

Petitioner's remaining claim of variance is similarly without support. He asserts that while the indictment charged him with negotiating concerning future employment exclusively with Weber, the evi-

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[7] The federal bribery statute, 18 U.S.C. 201(c), imposes criminal liability on a government official or employee who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value" in return for "being influenced in his performance of any official act."

[8] If, despite his characterization of this contention as a claim of "variance," petitioner instead means to argue that the probative value of the evidence was outweighed by the danger of unfair prejudice (see Rule 403, Fed. R. Evid.), that argument, which in any event is incorrect, is also foreclosed by the record in this case. The evidence that petitioner now protests was admitted at trial without objection (see Tr. 20-21) and was the subject of cross-examination (*id.* at 79-80). Petitioner did not challenge the evidence in the court of appeals.

Similarly, if petitioner means to suggest that there is a possibility the jury was confused about the precise charge against petitioner, that contention would be fully answered by the district court's instructions to the jury. Those instructions (Tr. 1242-1247), which petitioner did not challenge below, clearly and correctly defined the elements of an illegal gratuity offense.

dence at trial established that he negotiated with DeSanctis as well. The indictment charged that "[d]uring the period August 1982, through April 1983, [petitioner] was negotiating concerning prospective employment with Merle C. Weber." The evidence at trial established that DeSanctis worked for Weber, that she and Weber together approached petitioner for the first time on August 10, 1982, in an effort to persuade him to expedite his investigation of the Hartley matter, and that DeSanctis subsequently told petitioner that she and Weber planned to form a business together (see Pet. App. A2-A3). The evidence also established that petitioner and DeSanctis first discussed petitioner's future employment on August 27, 1982, and that they did so with the understanding that the decision whether to employ petitioner was Weber's (*id.* at A3). The evidence therefore conformed to the indictment and established that petitioner negotiated for future employment beginning in August 1982 and that he did so with Weber or with someone acting on Weber's behalf.[9]

3. Petitioner renews (Pet. 51-64) his challenge to the sufficiency of the evidence supporting his conflict of interest conviction. This factbound claim is entirely lacking in merit and does not warrant further review.

Petitioner suggests (Pet. 51-54) that even if Weber had a "financial interest" in the banks petitioner investigated, the Hartley investigation was concluded in January 1983, and that petitioner and

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[9] In any event, petitioner fails to show how he could have been prejudiced in any way by the asserted variance. See *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985).

Weber did not negotiate concerning future employment until February 1983. Hence, he asserts, he was not properly convicted on the conflict of interest count, as he did not, within the terms of Section 208(a), "participate[] * * * in a * * * proceeding" at any time during which, "to his knowledge * * * any person * * * with whom he [was] negotiating * * * concerning prospective employment, ha[d] a financial interest * * *." Even were it true, as petitioner claims, that his investigation terminated in January 1983, he still would properly have been convicted under Section 208, as his first negotiations about prospective employment with Weber commenced in August 1982.[10] In any event, petitioner's assertion that the investigation ended in January 1983 is incorrect, as the court of appeals concluded (Pet. App. A6-A7). The evidence at trial established that while Hartley agreed to plead guilty in January 1983, petitioner continued to debrief him, in an effort to collect evidence against creditors (including the banks in question), well after petition-

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[10] To the extent that petitioner contends that he was not engaged in "negotiation[s]" over future employment (see Pet. 46-49), he is clearly mistaken. Indeed, the discussions of petitioner's future employment with Weber resulted in an agreement by Weber to meet the conditions that petitioner had insisted on as the terms of his employment (see Pet. App. A3-A4), which clearly constitutes "negotiation" under any construction of the term. The case on which petitioner relies, *United States* v. *Conlon*, 628 F.2d 150 (1980) (rev'g dismissal of indictment), 661 F.2d 235 (D.C. Cir.) (on appeal from conviction), cert. denied, 454 U.S. 1149 (1982), does not support his claim. That case held that the term "negotiating" in Section 208(a) must be given a "broad reading" consistent with its ordinary meaning, 628 F.2d at 155, which plainly encompasses the conduct proved in this case.

er's meeting with Weber in February 1983 (see Tr. 797-798, 1217-1218).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

WILLIAM F. WELD
Assistant Attorney General

MAURY S. EPNER
Attorney

JUNE 1987

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[11] Petitioner's related assertions that Weber had no "financial interest" in the Hartley matter (Pet. 55-63) and that even if Weber had a financial interest petitioner was unaware of it (*id.* at 63-64) are wholly without merit. The evidence plainly showed that Weber stood to gain up to $1.25 million if he persuaded the banks in question to settle their disputes with the trustee in bankruptcy and that the threatened criminal prosecution would have put enormous pressure on the banks to settle (see Pet. App. A2). Likewise, the evidence established that petitioner was well aware of Weber's financial stake in the matter; there was testimony that petitioner repeatedly threatened Weber that if the money petitioner demanded was not forthcoming, petitioner would scuttle his investigation of the banks and thereby diminish Weber's bargaining leverage.

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No. 86-1625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PAUL G. GORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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STATEMENT

Regarding the Government's recitation of the facts, it was, understandably, selective. As in the trial and at the Court of Appeals, the government displayed the testimony of Merle Weber that Paul Gorman was a horrible government employee,

that he gave Weber grand jury testimony, that he "discussed" with Weber how to time grand jury subpoenas in order to place extra pressure on banks, that he extorted the loan from Weber, etc.

The only response to this is to restate that the testimony comes from Weber only, and as punishment for Petitioner doing his job as an Assistant United States Attorney, that is, because he terminated his inquiry of the banks which Weber, in delusion, felt owed him "retribution". The record clearly displays Weber and DeSanctis, both testifying under immunity, revealing a concerted effort, over a number of months, to place Petitioner into a, seemingly, compromising position so that they could blackmail him into prosecuting the banks which they desired to have indicted. DeSanctis' statements to Weber before the loan, advising him to make

Petitioner a loan "so we can own him", and Weber's statement to DeSanctis, after he made the loan, "now we have Gorman where we want him, I have loaned him some money", belie any attempt by the Government to portray them as persons from whom Petitioner "extorted" a loan.

The record clearly reveals that the Petitioner, with no knowledge of their scheme, accepted them as friends and simply did his job. He made a limited inquiry into the allegations, with the assistance and consent of his superior and the FBI. Finding no basis for the allegations he terminated the grand jury at the earliest possible time. He denied Weber's and DeSanctis' statement's at trial and continues those denials today.

To clarify a few points of fact brought up by the Government, the record reflects that Petitioner did not

"solicit" the loan from Weber. The trial record plainly states the testimony of DeSanctis and Weber, both testifying that Weber "volunteered" the loan to Gorman, in a purely social context, with no connection to his official position or duties.

Finally, the issue of "employment" is involved in both counts and discussed at length by the Solicitor General. The grand jury charged Petitioner under 18 U.S.C. 208 with negotiation for employment with one who had a financial interest in his official proceeding. He was also indicted for requesting or receiving the abstract gratuity of "future employment".

This was consistent with the government's analysis of 18 U.S.C. 201(g) that United States v. Williams, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983), alone controled what constituted a violation under the statute. That

analysis, basically, was that anything that a public official requests or receives, which the official determines to have "value" constitutes a violation.

The Government did not completely research the case law. If they did they would have found that the same Second Circuit that decided Williams, previously decided United States v. Umans, 368 F.2d 725 (2d Cir. 1966), and United States v. Irwin, 354 F.2d 192 (2d Cir. 1965) which interpretted the purpose of the statute to be, without question, to prohibit public officials from requesting or receiving the unauthorized compensation which is inherent in gifts and gratuities.

The Government responds only with a "straw man" agument which then proceed to knock down, suggesting that it is Petitioner's argument that only cash can stand for the "additional compensation"

inherent in gifts and gratuities under Section 201(g). This has never been the contention of Petitioner. Any item or service which can be transferred gratuitously can stand for the "anything of value" element, as well as cash.

The Solicitor General is attempting to divert the Court's attention from the true rulings of the cases cited by Petitoner, which are provided as precedent supporting the argument that Congress intended Section 201(g) to prohibit unauthorized compensation inherent in the request or receipt of gratuities. It there is no evidence of unauthorized compensation, that is, no gifts, then there is no evidence of a violation.

The Second Circuit was very emphatic when it stated that to convict an accused the government must prove that the purpose he had in making or promising a gift was to

give "additional compensation". United States v. Irwin, supra, at 197. Sections 201(f) and (g) make it criminal for a person to make a gift to an official and for the official to receive a gift, for doing something which the official is paid to do anyway. United States v. Umans, supra, at 728. See also, United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974) and United States v. Evans, 572 F.2d 455, 481 (5th Cir.), cert. denied, 439 U.S. 870 (1978) ("The gravamen of each offense...is simply the acceptance of unauthorized compensation.")

DIVISION IN THE CIRCUITS

"1. ANYTHING OF VALUE" ELEMENT

The Solicitor General did not respond to Petitoner's first reason for granting the Writ, which was because the instant decision divides the Circuits. The Second, Fifth and D.C. Ciruits, as noted above, interpret the intent of Congress, regarding

18 U.S.C. 201(f) and (g) as existing to prohibit the request or receipt of "unauthorized compensation" in gifts. They are specific and unanimous in their rulings.

The instant decision of the Sixth Circuit, specifically holds that entering into an economic exchange, that is paying for an item in full is meritless under Section 201(g) and that the "thing of value" element is proven, when the government proves that the official reqested or received something which he perceived to have value, notwithstanding the nature of the transaction, that is a valid purchase, lease or rental.

However, a valid purchase, lease or rental, in the other Circuits, would reflect that the official did not request or receive unauthorized, additional compensation, and the government, merely proving perceived value, would not

sufficiently prove the offense.

2. "INTENT" ELEMENT

Further, the Solicitor General did not dispute that the instant decision constituted a division among the Circuits regarding the issue of general criminal intent, raised by Petitioner.

The Second and Fifth Circuits specifically warned of the danger of possible criminal prosectution for accident, misunderstanding, inadvertence or other innocent reason, when they ruled that general criminal intent was an essential element of 18 U.S.C. 201(g) which the government must sufficiently prove to sustain a conviction under the statute. United States v. Irwin, supra, at 197; United States v. Evans, supra, at 480.

In the Circuits noted above, payment for an item or service would reflect the intent not to request or receive

unauthorized compensation in the form of a gift, and the element of general criminal intent, in those Circuits, would not be proven.

In the instant decision, the Sixth Circuit acknowledged the issue on intent that Petitioner raised, however, the Panel did not rule on the issue.

It is submitted, with respect to the Panel, that it is impossible to prove an intent to receive a gratuity, or the unauthorized compensation inherent in a gratuity, where the evidence proves that the official always intended to pay for the item or service, and, in fact, did pay for it prior to it ever being questioned.

The present limbo state has Petitioner and all other public officials in the dark as to the status of the law regarding the element of intent in a 201(g) prosectution. Since the Sixth Circuit elected not to rule

on the issue, precedent from the other Circuits would appear to control.

If the rulings from the other Circuits control, then the fact that the Petitioner did not request or receive any unauthorized compensation, that is no gifts or gratuities, leads only to the conclusion that the government did not prove the requisite element of intent.

VARIANCE ISSUE - GRATUITY COUNT

The response of the Government begs the issue. If the grand jury charges that the thing of value, in this case a loan, comes from a named party, "directly or indirectly", then the proof at trial must be so sufficient as to, at least prove that the loan originated from the party named in the indictment, and went through an intermediary to the public official. If the grand jury charged that it came from Weber, whether directly or indirectly, the

proof at trial must be consistent to prove that it, indeed, came from Weber.

The Circuit ruled that Weber "arranged" the loan. The Circuit did not rule that Petitioner knew of the arrangement. The President of the bank testified that he and Weber acted througout this period to keep from Petitioner knowledge of the reason for the loan and the President testified that Petitioner qualified for the loan in every respect.

The loan came from the bank, not from Weber, directly or indirectly. The Government cannot amend the indictment to fit their evidence. Petitioner had the moral and legal obligation to repay the loan to the bank, not to Weber.

The Government makes much that the loan was "unsecured", (Opp. 12) as if this was something extraordinary. Banks, loan

companies, credit unions, and individuals make unsecured loans every day. Again, in the absence of a gratuitous request or transfer which provided Petitioner with unauthorized compensation, no violation of Section 201(g) can be sufficiently proven.

The determining factors, which the Solicitor General did not discuss, was that Petitioner, after his comviction, could have been indicted for requesting or receiving the McComb Bank loan, using the same prosecutive theory as in the first indictment, and could not have claimed former jeopardy. Finally, the government presented the McComb loan, not as coming "indirectly" from Weber (not one witness testified it came from Weber "indirectly") but as "another" gratuity from the McComb bank for which he was not entitled.

There is inherent in the circumstances the substantial likelihood that Petitioner

was convicted for receiving a gratuity from the McComb bank, a crime for which he was not indicted.

CONFLICT OF INTEREST COUNT - NEGOTIATION

The Solicitor General minimizes the requirement that a defendant may only be convicted of a crime for which he is indicted. The grand jury charged Petitioner with negotiating with Weber only. The only evidence of negotiation with Weber occured on February 12, 1983. The Government stresses that Petitoner had a discussion regarding employment with DeSanctis on August 27, 1982, however, there is no requirement in the indictment for "indirect" negotiation.

The government could have paraded 50 witnesses before the jury, but for purposes of determining whether the government sufficiently proved what the grand jury charged, only the negotiation with Weber can be considered because only negotiation

with Weber would be relevant to the indictment. Even if the DeSanctis testimony is not a variance, the fact remains that the DeSanctis conversation was not "negotiation" with Weber.

DeSanctis further testified that the August 27 discussion involved only "potential". The issue of law, which the Solicitor General elected to ignore, is whether conversations involving potential employment may rise to the level of "negotiation" for purposes of 18 U.S.C. 208.

Finally, the Solicitor General states flatly that the Circuit ruled that there was an "agreement" for employment, as evidence of negotiation. (Opp. 15, fn 10) The Court is invited to read the passage of the Opinion to find that there was no evidence of such an "agreement", there or anywhere else. Also, there was no offer,

of employment or solicitation for employment by Petitioner in the record.

OFFICIAL PROCEEDINGS

What the Solicitor General does not acknowledge is that the so-called "Hartley investigation" was really a multi-subject investigation, involving Hartley, a man named Larry Miller and several banks, which Weber desired to be prosecuted as "participants" with Hartley in the check kite scheme. Petitioner conducted his investigation of the banks from August of 1982 until January 17, 1983. He found no grounds for the allegations of criminality, advised his supervisor and the attorney for the banks and terminated the investigation on that date. Trial testimony of the attorney and the supervisor firmly establish the January 17, 1983 date.

The Circuit found Weber to have a "financial interest" in Petitioner's

investigation of the banks only. When Petitioner's investigation of the subject banks terminated, on January 17, 1983, the official proceedings in which the Circuit found Weber to have a financial interest likewise terminated. The fact that the investigation of Hartley continued after that date until April, 1983 is of no consequence because Weber was not found to have a financial interest in Hartley.

On February 12, 1983, no "official proceedings" in which Weber was found to have a "financial interest" existed. Accordingly, even if Petitioner did "negotiate" with Weber on that date, the prohibitions of 18 U.S.C. 208 would not apply because Petitioner was not conducting any "proceedings" in which Weber had an interest, financial or otherwise.

The fact of the multi-subject investigation and the fact that the

investigation of the banks being terminated prior to the February 12, 1983 meeting, was not discussed by the Solicitor General.

The point of law then, which is not disputed, is whether a public official may negotiate for employment with a former subject of a criminal investigation, after the subject has been clearly terminated as a subject. According to the Circuit's ruling, once a subject is part of another investigation, the prohibitions of Section 208 apply until the investigation of every other subject in the investigation has been brought to an end. There is no precedent for such a contention.

FINANCIAL INTEREST - KNOWLEDGE

Petitioner argued that there was no evidence of "financial interest", as that term was intended by Congress in the prosecution. The "financial interest" found by the Circuit, while displaying

Weber's concern for the outcome of the case, gave him no interest in the subject of the investigation.

The Solicitor General put it thusly: "Weber became of the OPINION that the banks participated in Hartley's check kite..." "Weber CONCLUDED that if the scheme could be proved"...he would collect. "It was Weber's HOPE that the POTENTIAL liability and attendant publicity of a criminal proceeding would stimulate the banks to settle quickly with the creditors." (Opp. 3)

The question of law before this Court is critical to every public official in this country. Does the mere "opinion", "conclusion", and "hope" of a person grant that person a "financial interest" in the proceedings of the official, as was intended by Congress in enacting Section 208? Weber did not have the "financial

interest", contemplated by Congress as interpretted by this Court in United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1960).

Congress did not intend that anyone who believes he or she will gain from a certain official proceeding has, by that belief alone, a financial interest so as to trigger the prohibitions of Section 208. If so, public officials around the country would have to read the minds of every person they may wish to negotiate with.

Of critical importance are two points:

1. There is absolutely no evidence that Weber's beliefs, hopes, conclusions or were ever communicated to Petitioner.

2. There is absolutely no evidence that Petitioner had any knowledge of the "financial interest" which was found by the Circuit, at the time of the so-called "negotiation".

EDITOR'S NOTE

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PETITIONER'S SUPPLEMENTAL PETITION

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REASON FOR GRANTING THE WRIT

1. A violation of 18 U.S.C. 201(g) cannot be sufficiently proved in the absence of the public official requesting or receiving "additional compensation" to his or her official salary, for or because of an official act. (Petition for Writ of Certiorari, p. 13)

The above was Petitoner's first reason for the Court to grant the Writ, regarding the gratuity count.

Petitioner stressed the above argument to the Circuit in his appeal. There is no evidence in the December 23, 1986 Opinion to indicate that the argument, or the many cases from the other Circuits which supported the argument, were ever considered.

The Sixth Circuit, in the instant appeal, ruled that the government had sufficiently proven a violation of 18 U.S.C. 201(g) without having to prove that Petitioner requested or received a gratuity or additional compensation to his

official salary.

Instead, the Panel reacted as if Petitioner had made the same argument of Senator Williams, that the "things of value" were "valueless" and, therefore, could not stand as the thing of value. Such was never Petitioner's argument on appeal.

Petitioner's argument was that a valid purchase would, indeed, provide an official with something of value, but such could not consitute the "thing of value", intended by Congress under 18 U.S.C. 201(g) because there would exist no "gratuity" in the transfer or the "additional compensation" to the official's salary which other Circuit's deemed necessary to constitute a violation.

The Panel ruled that there is "no authority for the proposition that the

items received must be 'gratuities' as that term is commonly understood."

The Circuit ruled further that a violation may be proven even when the government fails to prove that the "thing" came to the official as a "gratuity".

The Circuit continued and ruled specifically that items or services which the official purchases, paying full and fair price, are still to be considered "things of value" under the gratuity statute. (Petiton for a Writ of Certiorari, Paul G. Gorman v. United States, No. 86-1625, App. A, p. A-9) official act.

United States v. Mario Biaggi and Meade Esposito, ____ F. Supp. ____ (Cr. 87-151 EDNY, September 22, 1987)

Since Petitioner filed his Petition for a Writ of Certiorari, Mario Biaggi, a Member of Congress from New York, and

Meade Esposito, were tried in federal district court in the Eastern District of New York for, among other things, violations of 18 U.S.C. 201(f) and (g). Esposito was charged with paying for spa vacations for Rep. Biaggi and a friend, for or because of official acts. Both were acquitted of the more serious bribery charges, arising from the same transactions and convicted of the lesser "gratuity" charges under 201(f) and (g).

Of significance to the Court's consideration of whether a Writ should be granted in the instant case is the express manner in which both the government and the district court, obviously located in a Circuit other than the Sixth, interpretted the elements of 18 U.S.C. 201(f) and (g) and the purpose of the statutes.

Because of the short time between the return of the convictions and the staff

shortages due to the Jewish Holidays of last week, Petitoner was unable to obtain certified copies of the government's requests for charges to the jury and Judge Weinstein's actual charge. Instead, copies were obtained from the Judge's office. Petitioner affirms that the documents appended to this Supplement to his Petition are true and accurate photostatic duplications of those charges.

Contrary to the interpretations of the elements of 18 U.S.C. 201(g) by the Sixth Circuit, the government's requested charge to the jury, regarding 18 U.S.C. 201(f) and (g) were as follows: (BA 661)

> Congress, in enacting the gratuity statute, sought to prohibit any government employee from receiving, in the course of his official duties, ANY ADDITIONAL TIP OR GRATUITY for or because of any official act already done or to be done in the future. THE AWARDING TO, OR RECEIPT OR ACCEPTANCE BY, A GOVERNMENT EMPLOYEE OF GIFTS OR GRATUITIES WAS DEEMED AN EVIL in itself since the employee may then

tend, subtly or otherwise, to give preferential treatment to those who give gifts. (Emphasis Added) (App. A, p. 1)

The purpose of the law that prohibits receiving gratuities is to prohibit the public official, in the course of his official duties, from receiving ADDITIONAL COMPENSATION, AS A TIP OR GRATUITY for or because of an official act. (Emphasis Added) (App. A, Infra, p. 3)

This charge is adapted from the gratuity charge given by Judge Pratt in the Harrision Williams, and John Murphy, cases. It includes language recommended by Judge Sand, Instructions of Authority. United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966); United States v. Strand, 574 F.2d 993, 995 & n.2 (9th Cir. 1978); United States v. Niederberger, 580 F.2d 63, 68-69 (3rd Cir.), cert. denied sub nom; Gent v. United States, 439 U.S. 980 (1978); United States v. Evans, 572 F.2d 455, 479-81 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); United States v. Brewster, 506 F.2d 62, 72, n. 26 (D.C. Cir. 1974).
(App. A. Infra, p. 5)

The Sixth Circuit used United States v. Williams, Supra, as it's primary

authority to rule that the only evidentiary requirement of the government was to prove that the items received were perceived by the official to have value. A reading of that case quickly reveals that the Second Circuit did not limit the evidentiary requirements in the manner found by the Sixth Circuit.

However, it is noteworthy that the government, in its requested charges to the jury in the Biaggi gratuity prosecution, affirmed to the district court that the charge it was requesting was the same charge used by Judge Pratt in the prosecution of Senator Williams. That charge, quite obviously, requires the government to prove, as elements of the offense, that both Senator Williams and Representative Biaggi requested or received "gratuities" which provided them "addittional compensation", for or because

of official acts.

Nothing in the government's requested charge limits the government to prove only that the official "perceived" the thing to have "value", as the sole determinant of guilt.

The Sixth Circuit's Opinion of the Petitioner's appeal is conspicuously absent, even though the ruling of law in that Opinion substantially reduces the government's burden of proving the crime. Every other Circuit which has considered the issue, however, is prominently displayed.

Judge Weinstein's charge was as follows:

> This provision, unlike the bribery provision, does not require a corrupt intent to influence a government official or employee. It prohibits the offering or giving or promise of giving to a public official ADDITIONAL COMPENSATION OR OTHER THING OF VALUE for or because of an official act. THE PROVISION DOES REQUIRE CRIMINAL INTENT. (Emphasis added) (App. B, Infra. P.3)

Like the government, the Chief Judge of the Eastern District of New York, a prominent Second Circuit jurist, did not interpret United States v. Williams, supra, to reduce the government's burden of proving the offense to "perceived value", as did the Sixth Circuit. It is reasonable to assume that, in the Second Circuit, district courts would have to follow the mandates of the Circuit as to the elements of a federal offense. Judge Weinsteins's election to instruct the jury in a fashion contrary to the ruling of the Sixth Circuit on the same elements speaks to the credibility of the Sixth Circuit decision.

The Second Circuit, itself, does not attach the meaning to United States v. Williams, supra, that was attached by the Sixth Circuit on the same issue.

The language cited above is the best

example of a Circuit, other than the Sixth, interpretting the purpose of the statutes in a contemporary ethical situation. Regarding the elements to be proven to sustain a conviction, the Second Circuit obviously, sides with the other Circuits, argued by the government to require the government to prove "additional compensation" to the official salary to sustain a conviction, through gifts and gratuites.

Representative Biaggi got something for free, a gratuitous vacation for him and his girlfriend. He did not pay for it nor did he reimburse Esposito for paying for it. This is a classic example of the proper use of the federal gratuity statute.

Petitioner's contention before the Circuit was that he was not proven to have requested or received a gratuity,

or the "additional compensation" inherent in a gratuity. Accordingly, his Motion for Acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, should have been granted.

The Circuit, in affirming the district court's denial of the Rule 29 Motion, parted from every other Circuit which has ruled on the issue. The instant ruling has also provided precedent for the government to prosecute any public official under 18 U.S.C. 201(g) and any vendor of goods or services to public officials under 18 U.S.C. 201(f) for offering/giving or requesting/ receiving things of value in instances where the "things" were not proven to have been transferred as gratuities.

Even in cases where public officials make valid purchases from vendors for goods and services, those very goods and

services, even though not transferred gratuitously, would still, under the ruling of the Sixth Circuit, constitute the transfer of "things of value", under 18 U.S.C. 201(g).

The reason the Sixth Circuit is wrong, and the reason the Writ should be granted is that the purpose of the statute is to prohibit the payment of "unauthorized compensation" to public officials, that is, gifts. There is no precedent which says the purpose of the statute is to prohibit officials from requesting or receiving items or services which they purchase and which are never intended to provide them with "additional compensation". Yet that is what the Circuit has ruled.

The division from the other Circuits occured when the Sixth Circuit failed to recognize the need for the government to

prove "additional compensation" to prove that the official requested or received a "thing of value".

When the Panel ruled that, as a matter of law, there is no need for the government to prove a gratuitous transfer of the "thing of value" listed in the indictment, the Panel ruled that there is no need for the government to prove the intent to give an official "additional compensation" or the intent of an official to receive such "additional compensation."

What about the honest public officials who will travel on corporate aircraft, eat at restaurants and lodge with constitutents at resorts? The honest officials will pay for their flights, their meals and their lodging. In every Circuit except, the Sixth, such conduct will not be violative of 18 U.S.C. 201(f) or (g) because the payment for the goods

or services will reflect an intent not to receive the things of value as gratuities and will not provide "additional compensation" to the officials.

However, in the Sixth Circuit, payment for these goods and services will be to no avail because that Circuit has ruled in the instant case that payment is "meritless" as a defense under 18 U.S.C. 201(f) and (g) because no need to prove a "gratuity" was intended by Congress.

To affirm the Petitioner's conviction, where no gratuity was proven, the Sixth Circuit has removed the requirement of having to prove a gratuity from the federal gratuity statute. Not only does this unprecedented ruling divide the Sixth from all of the other Circuits which have considered the issue, it makes a potential criminal out of every public official who pays for a "thing of value"

in the belief that only gifts and gratuities constitute violations of 18 U.S.C. 201(g).

Of primary importance is the requirement, expressed by Judge Weinstein, that "intent" is an element of the crime. Petitioner raised the issue to the Sixth Circuit, however, the Circuit elected not to rule on the issue of intent.

Intervention by this Court is required to settle the division of the Circuits. Of greater importance, this Court must protect all of the public officials whose conduct may be deemed criminal under the instant decision.

CONCLUSION

For the additional reasons cited above, it is respectfully submitted that a Writ of Certiorari should issue to review the decision of the Circuit Court.

APPENDIX "A"

REQUEST NO. 4

COUNT FIVE -- GRATUITY - DEFENDANT BIAGGI

If you find the defendant Biaggi guilty of Count Three, the bribery count, then there is no need for you to consider count five.

However, if you find that the government has not sustained its burden of proof on the bribery charge against the defendant Biaggi, you must then consider whether the defendant Biaggi violated count five.

Count Five charges the defendant Biaggi with violating what is known as the gratuity statute. That statute, Section 201(g), provides in pertinent part:

> Whoever, being a public official ... otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything

> of value for himself for or because of any official act performed or to be performed by him,

shall be guilty of a crime.

Congress, in enacting the gratuity statute, sought to prohibit any government employee from receiving, in the course of any official duties, any additional compensation or a tip or gratuity for or because of any official act already done or to be done in the future. The awarding to, or receipt or acceptance by, a government employee of gifts or gratuities was deemed an evil in itelf since the employee may then tend, subtly or otherwise, to give preferential treatment to those who give gifts. In short, the purpose of this statute is to assure high standards of ethical behavior by government employees, and to enforce uniform treatment of all citizens who have matters before government agencies.

The gratuity statute, unlike the bribery statute, does not involve any corrupt intent to be influenced in the performance of an official act. The charge here is what is known as a lesser included offense of the bribery charge and it is based upon the same events relied upon in connection with the bribery count. However, the essential elements are different. In order to find the defendant guilty of violating the gratuity section of the statute, you must find beyond a reasonable doubt:

First, between March 1984 and June 2, 1986, the defendant Biaggi knowingly and willfully asked, sought, accepted, received, or agreed to receive a thing of value described in the indictment for himself.

Second, that he asked, solicited, sought, accepted, received, or agreed to

receive the thing of value for or because of an official act performed or to be performed by him.

Third, that he asked, solicited, sought, accepted received, or agreed to receive the thing of value otherwise than as provided by law for the proper discharge of official duties.

These gratuity elements can best be understood by comparing them with the elements under the bribery statute.

The first element is the same except for two things. With the gratuity charge, the defendant must have asked for, sought, received or agreed to receive the thing of value, or at least part of it for himself or for his own benefit. With bribery, the first element is met if he received or agreed to receive the thing of value for himself or for others.

Also with respect to the first

element, it is required that the defendant act knowingly and willfully, the same as in the bribery charge, but keep in mind that corruptly is required under bribery and not under this charge.

The second element is that the defendant Biaggi asked for, sought, accepted, received or agreed to receive something of value for or because of an official act that had been performed or was to be performed by him.

The purpose of the law that prohibits receiving gratuities is to prohibit the public official, in the course of his official duties, from receiving additional compensation, as a tip or gratuity, for or because of an official act.

This requires you to consider why defendant Biaggi asked for, sought, accepted, received, or agreed to receive the payment of the spa expenses. From his

point of view, did he ask for, seek, accept, receive, or agree to receive the payment of the expenses at the spa in either the 1984-85 holiday season or the 1985-86 holiday season because of some official act that he had performed or would be asked to performed?

Here the government need only prove that the purpose of asking for, seeking, receiving or agreeing to receive the thing of value was to receive an additional reward, a gratuity, or tip, for or because of an official act performed or to be performed by defendant Biaggi.

Again, it is not necessary under this section that the government prove that the payment of or the promise to pay for the spa expenses actually caused, or prompted, or affected any official act; nor need the government prove the extent or the manner, or exact means by which the official act

might be done. And it is no defense that the official act was or would have been perfomed even if no gratuity was received. But the government must establish beyond a reasonable doubt that the thing of value was requested, demanded solicited, sought, accepted, received or agreed to be received because of some official act performed or to be performed by him in his position as a Congressman.

Finally, going back to the third element, that the defendant received or agreed to receive the thing of value otherwise than as provided by law for the proper discharge of official duty. This element is included in order to make it clear that lawful payments properly made to public officials such as salary, expenses, and fees of that sort, are not payments forbidden by the statute.

This charge is adapted from the

gratuity charge given by Judge Pratt in the Harrison Williams and John Murphy cases. 2/ It includes language recommended by Judge Sand, Instructions 16-2, 16-8. The language is also supported by an unbroken line of authority. United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966; United States v. Strand, 574 F.2d 993, 995 & n.2 (9th Cir. 1978); United States v. Niederberger, 580 F.2d 63, 68-69 (3d Cir.), cert. denied sub nom. Gent v. United States, 439 U.S. 980 (1978); United States v. Evans, 572 F.2d 455, 479-81 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v.

2/ Williams was convicted on the bribery charges, so the jury never had to consider the gratuity charges. Murphy, however, was acquitted of bribery but convicted on the gratuity charge. Notably, the defense did not even make an issue of the Court's charge on appeal. See United States v. Myers, et al., 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983).

Alessio, 528 F.2d 1079, 1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); United States v. Brewster, 506 F.2d 62, 72, n.26 (D.C. Cir. 1974).

REQUEST NO. 5

COUNT FOUR--GRATUITY--DEFENDANT ESPOSITO

The defendant Esposito is also charged with violating a provision of the gratuity statute in Count Four. As with the defendant Biaggi, if you find that the defendant Esposito is guilty on Count Two, the bribery charge, then there is no need to consider Count Four. If however, you acquit the defendant Esposito on the bribery charge, you must then consider whether he violated the gratuity statute.

The statute the defendant Esposito is charged with violating, Section 201 (f), states in the pertinent part:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly

> or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official, . .

shall be guilty of a crime.

Once again bear in mind that this provision, unlike the bribery provision, does not involve any corrupt intent to influence a government official or employee. The purpose of the law is to prohibit the offering or giving to a public official additional compensation such as a tip or a gratuity for or because of an official act.

The charge is based upon the same events relied upon in connection with the bribery count, but again it is what is known as a lesser included offense of the bribery charge and the essential elements are diffferent.

In order to find the defendant Esposito guilty of violating the gratuity

section of the statute, you must find beyond a reasonable doubt:

First, that the defendant Esposito between March 1984 and June 2, 1986, willfully and dnowingly offered, promised, or gave a thing of value for or because of an official act charged in the indictment that was performed or to be performed by Mario Biaggi.

Third, that the thing of value was offered, promised, or given otherwise than as provided by law for the proper discharge of official duties.

. . . .

This charge essentially repeats the language recommended by Judge Sand. Instruction 16-8. Some additional language has been taken from Judge Pratt's charges in Williams and Murphy.

APPENDIX "B"

JUDGE WEINSTEIN'S CHARGE TO THE JURY

Count four charges Mr. Meade Esposito with illegally giving a thing of value to Congressman Mario Biaggi in violation of 18 U.S.C. Section 201(f). The indictment reads as follows:

On or about and between March 1984 and June 2, 1986, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant, Meade Esposito, otherwise than as provided by law for the proper discharge of official duty, unlawfully, willfully and knowingly did directly and indirectly give, offer and promise to Mario Biaggi the payment of spa, recreation, food and other expenses incurred and to be incurred by Mario Biaggi and another person at the Bonaventure Hotel and Spa in the State of Florida, In December 1984 and January 1985 and in December 1985 and January 1986, for and because of official acts performed and to be performed by him as a Member of Congress, to wit: (1) his actions in matters concerning the decisions and actions of the Mayor, Deputy Mayors, and other officials and employedds of the City of New York in relation to matters concerning the Coastal Dry Dock and Repair Corporation's dispute with the City of New York and the Brooklyn Navy Yard Development Corporation regarding its utility and other charges and matters, (2)

his actions in matters involving claims submitted and to be submitted by the Coastal Dry Dock and Repair Corporation to the United States for work performed and to be performed on and in United States naval vessels and other vessels of the United States, and (3) his actions in matters involving the awarding of United States government contracts which would benefit the Coastal Dry Dock and Repair Corporation and which might at any time be pending and which might be brought before the departments, agencies and branches of the Government of the United States.

Section 201(f) provides:

Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official ... for or because of any official act performed or to be performed by such public official ...

shall be guilty of a crime.

If you find Mr. Esposito guilty under Count of the promise, offer, or payment of a bribe to influence Congressman Biaggi in the discharge of his official Congressional duties, do not consider the charges in count four.

If you find that the government has

not sustained its burden of proving beyond a reasonable doubt that Mr. Espcsito promised, offered, or gave the money or thing of value with corrupt intent as required under the bribery charge, count two, you must then consider whether the defendant violated this statute.

This provision, unlike the bribery provision, does not require a corrupt intent to influence a government official or employee. It prohibits the offering or giving or promise of giving to a public official additional compensation or other thing of value for or because of an official act. The provision does require criminal intent.

Unlike the bribery charge in count two, the charge in count four can apply to past official acts as well as to future ones. Therefore, payments to officials for acts that would have been performed in

any event--whether before or or after those acts have occured--can be illegal, while a bribe must involve an exchange of something of value to induce an official act in the future.

The charge in count four is base upon the same events relied upon in connection with the briber count, but the essential elements are different.

In order to find the defendant Esposito guilty of violating Section 201(f) of the statute (count four), you must find beyond a reasonable doubt three elements:

First, that between March 1984 and June 2, 1986, the defendant wilfully and knowingly offered, promised, or gave a thing of value as charged in the indictment of Mario Biaggi. This is a criminal state of mind less than that required for bribery but which still

requires a purposeful disobeyance of the law.

Second, that Mr. Esposito offered, promised, or gave the thing of value for or because of a specific official act or acts charged in the indictment that was performed or to be performed by Mario Biaggi. There must be a connection between the thing of value and the official act. You must also decide whether the acts charged were "official."

Proof of only a general desire to influence the Congressman or curry favor with him is insufficient. In order to convict Mr. Esposito of the crime of giving illegal compensation, you must find that the government has proved beyond a reasonable doubt that the purpose that Mr. Esposito had in mind in giving a thing of value to Congressman Biaggi was to give him compensation in addition to his

regular Congressional compensation paid by the United States, for or because of his actions on behalf of Coastal Dry Dock and Repair Corporation. The act is criminal if the official act was or would have been performed even if no thing of value were received. If the thing of value was given out of friendship or for any other reason not charged in the indictment, it is not a crime.

Third, that the thing of value was offered, promised, or given otherwise than as provided by law for the proper discharge of official duties.

Count Five charges Congressman Biaggi with violating the statute, Title 18 U.S.C. Section 201(g). The Indictment reads as follows:

On or about and between March 1984 and June 2, 1986, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant, MARIO BIAGGI, a

Member of Congress, otherwise than as provided by law for the proper discharge of official duty, unlawfully, wilfully and knowingly did directly and indirectly ask, demand, exact, solicit, seek, accept, receive and agree to receive for himself, from Meade Esposito, the payment of spa, recreation, food and other expenses incurred and to be incurred by the defendant MARIO BIAGGI, and another person at the Bonaventure Hotel and Spa in the State of Florida, in December 1984 and January 1985 and in December 1985 and January 1986, for and because of official acts performed and to be performed by him as a Member of Congress, to wit: (1) his actions in matters concerning the decisions and actions of the Mayor, Deputy Mayors, and other officials and employees of the City of New York in relation to matters concerning the Coastal Dry Dock and Repair Corporation's dispute with the City of New York and the Brooklyn Navy Yard Development Corporation regarding its utility and other charges and matters, (2) his actions in matters involving claims submitted and to be submitted by the Coastal Dry Dock and Repair Corporation to the United States for work performed and to be performed on and in United States naval vessels adn other vessels of the United States, and (3) his actions in matters involving the awarding of Coastal Dry Dock and Repair Corporation and which might at any time be pending and which might be brought before the departments, agencies and branches of the Government of the United States.

Section 201(g) reads as follows:

> Whoever, being a public official, ...otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him...

shall be guilty of a crime.

If you find Congressman Biaggi guilty under count three, you should proceed no further and not consider the charge in count five. However, if you find that the government has not sustained its burden of proving the bribery charge against Congressman Biaggi, you must then consider whether Congressman Biaggi violated count five.

Unlike the bribery statute, section 201(g) does not involve corrupt intent to be influenced in the performances of an official act. It must be shown only that the act was committed knowingly and purposefully and not through accident,

misunderstanding, inadvertance of other reasons not charged in the indictment.

Section 201(g), unlike the bribery section, applies to payment for past official acts as well as for future ones.

To find Congressman Biaggi guilty of violating section 201(g), you must find the following four elements beyond a reasonable doubt:

First, that between March 1984 and June 2, 1986, Congressman Biaggi knowingly and wilfully asked, sought, accepted, received or agreed to receive a thing of value -- the expenses of the spa -- for himself. This is the same as the first element of the briber charge, except for two facts: (1) the defendant must have asked, sought, accepted, received, or agreed to receive expenses of the trips to the spa at least partly for his own benefit, and (2) it is necessary that the

government show only that Congressman Biaggi acted knowingly and wilfully. He need not have received all of the value sought or promised. If Congressman Biaggi believed the thing of value was being given solely out of friendship, or for any other reason not charged in the indictment, he would not be guilty.

Second, you must find that Congressman Biaggi asked, solicited, sought, accepted, received or agreed to receive the thing of value for or because of an official act performed or to be performed by him. The government must prove that Congressman Biaggi's purpose in asking for, seeking, receiving or agreeing to receive the spa expenses was to receive compensation, in addition to that paid by the United States to him as a Congressman, and that the expenses were requested, received, or agreed to be received because

of an official act performed or to be performed by Biaggi in his position as a Congressman. The act is criminal even if the official act was or would have been performed had no thing of value been received. If the thing of value was given or offered out of friendship or for any other reason not charged in the indictment, it is not a crime. There must be a connection between the thing of value and the official act. You must also decide whether the acts charged were "official."

Third, you find that Biaggi asked, solicited, sought, accepted, received, or agreed to receive the thing of value otherwise than as provided by law for the proper discharge of official duties.

As to Count Four--that is as to Mr. Esposito--, the government must prove that the substantial and determining intent in

giving, offering, or agreeing to give something of value was for or because of the Congressman's official acts on behalf of Coastal Dry Dock.

As to Count Five--that is as Congressman Biaggi--the government must prove that the substantial and determining intent in receiving, seeking or agreeing to receive something of value was for or because of the Congressman's official acts on behalf of Coastal Dry Dock.

Proof that the Congressman understood that there was only a general desire to influence him or curry favor with him is insufficient to prove guilt.

I said Counts Four and Five required a lesser criminal intent. It is a different criminal intent.